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MONTGOMERY COUNTY

LAW REPORTER,

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY,

TOGETHER WITH ALL THE CASES ARISING IN SAID COUNTY, DECIDED BY

THE SUPREME COURT OF PENNSYLVANIA,

FOR THE YEAR 1888.

VOL. IV.

REPORTED BY F. G. HOBSON AND JOHN W. BICKEL,
OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.:
1889.

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Pres. Nov. 13, 1896.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

FRANK H. BOLTON ET AL. VS. JAMES S. SWARTZ, OWNER, AND THE STONY CREEK IRON COMPANY (LIMITED), LESSEES, AND THE LUCINDA FURNACE COMPANY.

Who is a "principal defendant" within the meaning of the act of April 6, 1859, conferring power upon courts having equity jurisdiction to serve process upon non-residents.

Where a bill is filed against several defendants without disclosing the fact that there was any combination, agreement, conspiracy or concert of action between them, the fact that each independently did the same thing, producing a like result, does not connect them in a joint enterprise, so as to warrant the plaintiff in treating either one as a principal defendant.

Failure to state the non-residence of a defendant in the bill will not of itself be sufficient to defeat an order of service made upon such non-resident by order of the court.

RULE to set aside service.

On a rule for a preliminary injunction this case was reported in 3 MONTGOMERY COUNTY LAW REPORTER, 191.

Larzelere & Gibson, Esqs., for complainants.

Henry Freedley, Esq., for James S. Swartz, one of defendants.

The facts sufficiently appear from the opinion of the court delivered January 2, 1887, by WEAND, J.

This bill was filed against James S. Swartz, owner, and the Stony Creek Iron Compay (Limited), lessees, and the Lucinda Furnace Company, defendants. Service was had upon James S. Swartz, a resident of the city of Philadelphia, under the provisions of the act of April 6, 1859, P. D. 698, Pl. 47, conferring power upon the court having equity jurisdiction, upon special motion of the plaintiff or plaintiffs in any suit in equity which has been or shall be instituted therein, concerning goods, chattels, lands, tenements or heriditaments situate or being within the jurisdiction of such court, or where the court has acquired jurisdiction of the subject matter in contro-

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versy by service of its process on one or more of the principal defendants, to order and direct that any subpœna or other process to be had in such suit be served upon any defendant or defendants therein then residing or being out of the jurisdiction of such court, wherever he, she or they may be found.

In their special motion for order of service on James S. Swartz the plaintiffs assign as cause "that service of said bill has been duly had upon two of the principal defendants in said bill." If, therefore, we can from the bill itself gather anything which would bear out this allegation of the plaintiffs, the court had jurisdiction to order the service made upon the non-resident defendant.

The fact of his non-residence is not stated in the bill, as required by Rule XX of equity practice.

The defendant, Swartz, now asks us to set aside the service had upon him under the order of the court, for the following reasons:

1. The fact of non-residence is not stated in the bill.
2. The court had no jurisdiction because:

(a) The decree if made must be *in personam.*

(b) The parties served were not principal defendants.

3. The bill is multifarious.

We do not think that the first objection is fatal, and we are not willing to set aside the service on that ground alone. The special motion becomes a necessary part of the proceeding and is sufficient to warrant an order of service. It may frequently happen that the plaintiff only discovers the non-residence of a defendant after bill filed, or the defendant may remove after filing of the bill and before service, and the plaintiff ought not therefore be driven to the cost and trouble of a new suit.

As the question of lands, tenements, etc., being situate within the county is not assigned as a cause for the order of service, we must treat the motion as having been based and the order issued upon the only reason assigned, namely, "service upon the two of the principal defendants within the county."

There is no allegation in the bill that there was any combination, agreement, conspiracy or concert of action between the defendants to do the acts complained of. Each is complained of as being a separate and independent actor in reference to his own property. There need not necessarily be a joint decree, and separate suits could have been instituted against each defendant. That they each

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independently did the same thing, producing a like result, does not connect them in a joint enterprise nor does it warrant the plaintiff in treating either of them as a principal defendant. Their actions are as separate and distinct as if they had been guilty of different acts affecting the plaintiff in entirely different ways.

In Huntzinger et al. vs. The Philadelphia Coal Co. et al., 11 Phila., 609, it was held that a principal defendant, within the meaning of the act of 1859, above cited, is such a person who is affected by a decree of the court *and* necessarily involved in the subject in controversy; and in 1 Wash. C. C. Rep., 518 (cited), Mr. Justice Washington held "that in deciding who ought to be parties it is necessary to distinguish between active and passive parties, between those who are so necessarily involved in the subject in controversy and the relief sought for, that no decree can be made without their being before the court." The bill itself charges the defendants with dumping slag, etc., from their *respective* mills, furnaces, etc., and in other respects shows that in no way are they connected with each other in the wrongs complained of. We hold, therefore, that the bill itself showing that neither of the parties are principal defendants within the meaning of the act of 1859, that the service upon James S. Swartz is bad and must be set aside. This renders a discussion of the remaining points unnecessary.

And now, January 2, 1888, the service of the bill heretofore made upon James S. Swartz, one of the defendants in this case, is set aside.

Court of Quarter Sessions of Chester County.

Road in West Whiteland Township.

Where damages have been assessed by the jury laying out a public road in pursuance of the act of Assembly of 1874, or the jury have determined that no damages will be sustained, the land owner can not disregard such assessment or determination and apply at any time within six years after the road is confirmed and opened for viewers to assess the damages sustained.

The act of 1874, authorizing the assessment of damages by the jury laying out a public road, is not unconstitutional, and does not fall within the prohibition considered In re Grape Street, 7 Out., 121.

Francis C. Hooton and *John A. Groff, Esqs.*, for petitioners.

William B. Waddell, Esq., for county of Chester.

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Road in West Whiteland Township.

The opinion of the court was delivered August 16, 1886, by FUTHEY, P. J.

A public road was laid out by a jury of review in the township of West Whiteland and the damages to the owners of lands through which the same passes assessed, and the report of the jury duly confirmed and the road entered of record and an order issued to open the same, and it is now opened.

Henry E. Gray, one of the owners of land through which the road passes, disregarding the assessment of damages made by the jury, now petitions the court for the appointment of viewers to assess the damages which he alleges he has sustained.

If this road proceeding was wholly under the act of 1836, the petitioner would have standing in court. That act provided for the laying out and entering on record of public roads, but the jury laying them had nothing to do with the assessment of damages. After the road so laid out was entered of record and had been opened, the land owner might apply to the court by petition, within one year after such opening, for a jury to assess damages; or, under the decision of the Supreme Court in re Grape street, 7 Out., 121, since 1874, within six years after such opening. Under that act no one but the owner could apply for the assessment of damages.

The act of May 14, 1874, P. L. 164, however, provides that thereafter "it shall be the duty of all persons appointed in the several counties of this commonwealth to view and review any public or private road or bridge, if they shall decide in favor of locating such road or bridge, to endeavor to procure from the persons over whose lands such location may be made, releases from all claims for damages that might arise from the opening of such road or the building of such bridge; and in every case where such viewers shall fail to procure such releases, and it shall appear to them that any damages will be sustained, it shall be their duty to assess the damages and make report thereof, signed by a majority of their number, and return the same, together with all releases obtained, to the Court of Quarter Sessions; and the damages so assessed shall be conclusive, or may be subject to appeal, review or modification, as may be provided by existing laws in the different counties of this commonwealth."

Under the provisions of this act the jury who laid out the road in question assessed the damages done to the land owners, and, among

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them, the damages done to the lands of Henry E. Gray were assessed at the sum of one hundred and twenty-five dollars. To this report Mr. Gray filed exceptions, that the damages awarded to him were insufficient, and that the jury did not listen to arguments and reasons as to the non-necessity of said road and the amount of damages, if it was laid out, that the owners of lands would sustain and should be entitled to receive. The exceptions were heard by the court, and after consideration the court determined that they were not sustained, and they were dismissed and the report confirmed. No complaint was made in the exceptions of want of notice, and the report shows that, in addition to the public notice of the time and place of meeting required by law, personal notice as required by the rule of court was given to Henry E. Gray and the other land owners. The petitioner here has therefore been duly heard and has had his day in court, and his further complaint can not now be entertained.

It is argued on his behalf that the act of 1874 falls within the constitutional prohibition considered in re Grape street, *supra*, and that the report of the jury, so far as concerns the assessment of damages, is void—in other words, that damages can not be assessed except on the petition of the land owner, who has six years after the road is opened within which to apply for such assessment. The provision of the constitution referred to is this: "No act shall prescribe any limitation of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided."

We do not think this provision was intended to interfere with the power of the Legislature to provide for the assessment of damages by the viewers laying out a road, or for the appointment of viewers for that purpose, on the petition of either party. The land owner is not to be deprived of such assessment unless the period fixed by general laws is allowed to elapse without action, but such assessment may be made, short of that period, by provision of law. The Supreme Court, in recent cases, has recognized the authority of juries laying out roads to assess damages, drawing a distinction between public roads and private roads as to notice to the land owner, holding that in the latter it should appear of record, but in the former may be shown, if questioned, in the Quarter Sessions by oral proof.

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Road in Plum Creek Township, 43 Leg. Int., 4; Road in Redstone Township, 2 Amerman, 183 S. C. 17 W. N. C., 556.

In acts of Assembly authorizing the construction of railroads, provision is made for the assessment of damages by viewers appointed on the petition, either of the railroad authorities or of the land owner, and the land owner is concluded by such assessment made on the petition of the railroad company, just as if made on his own petition. The constitutionality of such assessments, so far as we are aware, has never been called in question. If the argument for the petitioner here is sound, then no assessment of damages can be made on the petition of a railroad company, but such company would have to await the pleasure of the land owner during six years before damages could be ascertained and settled.

Again, in the case of a public road, the commonwealth, in taking land for its own use, exercises its right of eminent domain, and it may be so taken without compensation. Township of East Union vs. Cumrey, 4 Out., 362; Road in Plum Creek Township, *supra.* And the damages, when authorized, may be paid by the commonwealth, or she may direct that they be paid by the city, borough or county, or by assessments made by the viewers upon property which will be benefited by the improvement. Bachler's Appeal, 9 Norris, 207. It would seem to follow, as a matter of course, that the commonwealth, in providing for the payment of damages in such cases, may provide the machinery for their ascertainment. See also Black vs. Nockamixon Township, 2 Pa. C. C. R., 116.

The damages done the petitioner by the opening of the road in question, having been ascertained in the manner prescribed by law, his petition now presented is dismissed.

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Court of Common Pleas of Montgomery County.

GOURLEY VS. LUKENS ET AL.

When manure, timber and fencing will pass by a sale of the realty.

Under a fi. fa. certain manure, fencing material, etc., not specifically levied on or advertised, were sold as personalty under the designation of "balance," but not removed until after a subsequent Sheriff's sale of the realty. *Held*, that these articles passed with the land.

Lumping sales not favored.

MOTION to dissolve writ of estrepement.

Larzelere & Gibson, Esqs., for motion.

The facts sufficiently appear from the opinion of the court delivered January 2, 1888, by WEAND, J.

This writ was only allowed as against Lydia Lukens and W. Alexander Lukens, and was therefore improvidently issued against John Coltman. The plaintiff is the purchaser at a Sheriff's sale of the real estate of Lydia Lukens, and asks us to restrain the said Lydia Lukens and W. Alexander Lukens, who occupy the farm, from cutting down timber trees, removing fencing rails and fencing, timber trees, manure in barn-yard, and from taking up and removing corn fodder.

The defendants, by their answer filed, deny that they have cut down any timber or removed the same, or that they have torn down or removed any fencing. They admit, however, that they have used as fire-wood a pile of cut wood which was cut before the writ issued upon which the premises were sold, and also that they are using for fire-wood on the premises an old pile of rotten fencing taken out of the fences a year ago when they were repaired. They also aver that the corn fodder does not belong to them but to persons who bought it at a Sheriff's sale of the personalty before the sale of the real estate; and that the manure belongs to one John Coltman, who bought it from Kline Van Winkle, who became the purchaser at said sale of the personalty.

It appears that a fi. fa. against the personalty and a lev. fac. against the realty were issued the same day. Under the fi. fa. no rails, posts or manure were specifically levied upon, nor were they sold *eo nomine* at said sale. After the various articles specifically levied on were sold by name, the balance was sold to Kline Van

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Winkle for one dollar, and he claims that he thus got title to the posts, rails and manure.

The motion to dissolve might well be refused for the reason that, as the defendants disclaim ownership and deny any intention of removing the property, no harm can result to them by the continuance of the writ, while it may serve as a protection to the plaintiff if his rights are in danger.

Besides, it is clear to us that the pretended sale to Van Winkle passed no title. As well might the Sheriff sell valuable horses, cattle or other property under the designation of "balance," without naming or designating them, as to convey a good title to these articles. Lumping sales are not favored, and whenever practicable the different articles should be pointed out and named, so that all persons present may have notice of what is being sold. No other rule can protect creditors or debtors. If, therefore, there was no sale or severance of the manure, fencing material, timber, etc., the question arises as to whether they passed to the purchaser of the land.

As between landlord and tenant the law in Pennsylvania—where a farm is let for agricultural purposes—is that manure in heaps, or scattered in the barn-yard, or on the fields, belongs to the freehold, and can not be removed by the tenant or sold by his creditors unless reserved in the lease: Lewis vs. Jones, 5 Harris, 262, and the decision is based partly upon the ground that "such a course of husbandry (i. e., removal of manure) would be injurious to the public interests and ruinous alike to landlord and tenant." And the same reasoning, in our opinion, would apply to a case of vendor and vendee or debtor and creditor. In Parsons vs. Camp, 11 Conn., 325, the question arose between vendor and vendee, and it was there held that manure spread upon land or scattered about the barn-yard will pass by a deed of the land, and that heaps of manure under certain circumstances are personal property and will not pass by deed of the land, but that this might be a question for a jury to decide.

The owner of the land might so collect the manure before a levy and sale as to indicate an intention to sever it or to dispose of it as personal property, but here nothing of the kind was done; the owner of the land disclaims title, and the Sheriff's sale of the personalty, as we have said, passed no title for it. It would therefore remain as part of the realty, and the purchaser of the farm is entitled to be protected so far as we are able to do so by this writ. This

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would also apply to the timber trees standing or cut since the sale, and those cut or fallen before the sale, but which had not been converted into logs or fencing. The timber which had fallen at the date of the Sheriff's deed, but had not been converted into saw logs, rails, etc., passes to the purchaser of the realty: Leidy vs. Proctor, 1 Out., 486. The fencing stuff, posts, rails, etc., which had once been used in the fence, but had been taken down and piled up for future use again in the same place, retains its character of realty; but new fencing material just bought or just cut (from timber not grown upon the premises), and never attached to the soil, would not pass to the purchaser of the land.

These questions will more properly arise hereafter should Coltman or Wynkoop, the alleged purchasers, attempt to remove any of the property; but as the counsel in the case have argued the questions and thus invited our opinion, it is now given.

The result of our conclusion is that the writ must be quashed as to John Coltman, having been improvidently issued against him; and that the motion to dissolve as to the other defendants is refused, except so far as it restrains them from using as fire-wood on the premises a pile of cut wood which was cut before the writ of lev. fac. was issued.

And now, January 2, 1888, writ set aside as to John Coltman. Motion to set aside writ as to other defendants refused.

Orphans' Court of Montgomery County.

Estate of Jesse Ziegler, Dec'd.

Executors are chargeable with the entire income of the trust estate as well as with the amount they were in duty bound to collect for the protection of the legatees.

Where an executor invests the estate funds in his individual name, or uses them in his own business, or conceals the fact that the funds are so invested, he can not be allowed commissions.

Exceptions to the report of Franklin March, Esq., auditor in said estate.

Charles Hunsicker, Esq., for executors, the exceptants.

J. P. Hale Jenkins, Esq., contra.

The facts sufficiently appear from the opinion of the court delivered January 2, 1888, by Swartz, P. J.

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Ziegler Estate.

The executors in this estate kept no joint account; each received about one-half the funds of the estate and took charge of them. An executor must account for all the income of the estate. He can make no profit for himself out of the trust funds. The accountants must therefore be surcharged with the interest received.

Boyertown Bank loan, interest	$996 46
Perkiomen National Bank loan, interest	100 00
Interest on moneys of the estate loaned sundry persons, as per account furnished	335 31
John G. Hillegass owed the estate the sum of $4000 for money borrowed from testator. This loan was unpaid when the parties met before the auditor, and interest is due at least at the rate paid in the life-time of the testator, which was 4 per cent. Interest from January 1, 1885, to June 1, 1887	386 66
The mill property was purchased for the accountants, but no money was paid by them. They had the income of the property and should pay interest on the purchase money from the time they obtained title—that is, from April 1, 1886, to June 1, 1887.	606 70
The bank stock purchased by the wife of John G. Hillegass was not paid for, but she was allowed to receive the dividends. As it does not appear what these dividends are, the executors must be charged with interest on the proceeds of the stock from September 3, 1885, to June 1, 1887.	66 36
The accounts also admit a charge of $10 cash received of S. Butterwick.	10 00
	$2501 69

This seems to cover the amount of interest actually received by the accountants, as well as the amount they were in duty bound to collect for the protection of the legatees. There is some evidence that John G. Hillegass mingled the funds of the estate in part with his own. He says he kept no separate account of the estate's funds, considering it unnecessary. Upon occasions he used some of the estate's money in his private business. He kept a trust account, however, which showed balances in bank averaging about $3000, and we can not say that he used the trust funds in his business so as to make him liable for interest beyond the surcharges above enumerated.

We can not allow John G. Hillegass full commissions. Of the $30,000 charged against him as executor when the account was filed not more than $4000 stood in his name as executor, and in December, 1886, not a dollar remained in the trust account. The money was in his hands and held individually or invested in the name of John G. Hillegass. He loaned some of the money from time to time in small amounts of $500, $900, $400, and exacted no interest, thus jeopardizing to a certain extent the funds of the estate without any possible benefit to the legatees. No doubt he was at all times able

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to make good any losses, but misfortune and insolvency might have overtaken him, and the funds of the estate would have been lost. His death in December, 1886, would have disclosed the fact that the trust account was exhausted, with all the funds in his use or invested in his name. Of the $30,000 due by him not a dollar was ear-marked as belonging to the estate of Jesse Ziegler, deceased.

The executor was a director in the Perkiomen National Bank and an intelligent business man, and we ought to expect a more careful execution of the trust. There is, however, a more serious aspect of the case. This accountant had received or there was due him more than $1300 interest on moneys invested in his name belonging to the estate. The exceptions filed gave him notice to account for any moneys received and not included in the account. At the first meeting of audit he asks for additional credits and directs a charge of ten dollars for cash received since filing the account, but not one word is offered in explanation of his failure to account for the interest due the estate. His examination before the auditor ends and he is called for cross-examination, and then for the first time he discloses the fact that he had some of the estate's money invested; but he speaks of but one such investment. The audit proceeds, and not until the second meeting after this disclosure do we hear of any other investments. It is true he may have believed that this interest belonged to him, but it is difficult to see how an intelligent accountant can persuade himself that he is entitled to full commissions and to the entire income of the estate besides. The fact that the funds of the estate were invested in the name of John G. Hillegass made it difficult for the exceptant to ascertain the true state of affairs.

The following facts are established by the testimony: Hillegass invested the moneys of the estate in his own name. He admits that he sometimes used estate funds to pay for goods furnished in his business, but alleges that this did not occur often; he can not remember the number of checks so used. He failed to account for the interest received on the moneys so invested in his name until the fact was elicited from him upon cross-examination before the auditor. He charged himself in his account as executor with moneys due from himself for cash borrowed from the testator and for property purchased at his own executor's sale, without the payment of such money, and while he was using the same in his individual invest-

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ments, and failed to account for interest so derived, and even now denies his liability to pay such interest.

The law treats an investment of trust funds in the trustee's individual name as a concealment: Norris Appeal, 21 P. F. S., 125. The amounts so invested in his own name aggregate $20,000. This failure to account, under the circumstances and in connection with the other acts of the executor referred to, compels us to disallow commissions to the extent of $1000. Donnelly's Estate, 12 Casey, 190.

It does not appear that John Ziegler, the other executor, had anything to do with these investments. He kept a trust account, and there is no testimony disclosing any wrong on his part except that the executors parted with the title to valuable real estate without receiving a dollar of the money due on the sale. The title was made in their interest; they received the full income of the property; the estate received nothing, nor was there any bond or other obligation to take the place of the property which the legatees had lost by the sale. This executor can not be allowed commissions on the proceeds of the mill property. Whether the sale is valid is immaterial at this time. There is no one disputing it except for inadequacy of price, and the evidence does not sustain this position.

We fail to see why the note of $220 is not charged as an advancement against Mrs. Boyer. The will directs that all notes of the children shall be treated as advancements. There is no intimation that the note is part of the $8801. Even if proof were allowable to establish this, the evidence is entirely insufficient. If he meant to make a computation and include the note in the amount, why was the note preserved?

But, aside from the will, this note was due October 4, 1881, and was not barred in August, 1887, when the auditor made his distribution. Why should she not pay her debt? The will certainly does not relieve her. The will clearly requires all the children to account for moneys received from the testator.

Upon the argument it was admitted that by an error the vendue bill of Mrs. Boyer was given as $155.35, when the true amount is but $55.35. This error is corrected in the distribution.

The auditor properly charged one-half the expenses of audit to the accountants: Gobel's Appeal, 12 Casey, 395.

The executors filed an account showing charges on the debit side of nearly $100,000 and credit items numbering nearly one hun-

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dred, and yet there is not a single date to any item of charge or credit.

The auditor is correct in his construction of the bequest to Kate O. Hanley. The testator could not have intended death without children in his life-time. Such an interpretation gives no effect to the words "*in such case all the money she drew out of my estate* shall fall back to my other *children*." See also Eschelberger vs. Barnetz, 17 S. & R., 293.

The auditor has bestowed much labor upon this estate, and while we differ slightly in making surcharges the general result varies very little from that of the auditor.

We append a distribution in accordance with our rulings, instead of referring the matter back to the auditor. By so doing time may be saved in securing a final decree.

Balance in hands of executor, as per account filed		$59,529 00
Add surcharge of interest		2,501 69
" " commissions disallowed to John G. Hillegass		1,000 00
" " " " John S. Ziegler, to wit, 2½ per cent. on $4335		108 37
" interest on Mrs. Boyer's vendue bill		7 20
		$63,146 26
Less amounts expended by accountants since filing the account		44 40
Balance for distribution		$63,101 86

Expenses of Audit.

Auditor's fee	$210 00	
Advertising	7 50	
Clerk of Orphans' Court	15 00	
Witness fees due Henry J. Smith	11 92	
	$244 42	
To be paid by accountants	$122 21	
" " out of estate	122 21	122 21
Net balance for distribution to legatees		$62,979 65
Add advancement to Mrs. Boyer, two notes	$272 50	
Charge in will	8801 00—	9,073 50
		$72,053 15

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Cowden to use vs. Bechlar et al.

To John S. Ziegler, one-fifth		$14,410 63
Caroline Hillegass, one-fifth		14,410 63
Sarah Keeler, one-fifth		14,410 63
Mary Boyer	$14,410 63	
Less advancement	9,073 50—	5,337 13
[NOTE.—When the share of Mary Boyer is paid to her the $5337.13 must be reduced by vendue bill and interest $62.55, leaving her a balance of $5274.58.]		
To Kate O. Hanley, as provided in the distribution of the auditor.		14,410 63
Total cash distributed		$62,979 65

And now, January 2, 1888, the exceptions to the auditor's report, except so far as they are sustained by this opinion, are dismissed and the report of the auditor is confirmed.

Court of Common Pleas of Montgomery County.

JACOB M. COWDEN TO THE USE OF ANNA EVANS, EXECUTRIX OF JOSIAH W. EVANS, VS. CAROLINE BECHLAR, H. D. BECHLAR AND A. D. BECHLAR.

Where money is due upon a written security it is the duty of the debtor to see that the person to whom the money is paid for the creditor is in possession of the security or evidence of indebtedness; it is not sufficient to show that the person receiving the money had made the investment for the creditor as his agent.

RULE to open judgment and let defendants into a defence.

Montg. Evans, Esq., for plaintiff.

J. P. Hale Jenkins, Esq, for defendants.

The facts sufficiently appear from the opinion of the court delivered January 2, 1888, by SWARTZ, P. J.

At the time this application was made Jacob M. Cowden was dead, and one of the defendants, A. D. Bechlar, was also dead.

Whether Anna Evans is a competent witness is immaterial. The testimony of Mrs. Tarrence does not differ from that of Mrs. Evans so far as it relates to the dealings between the parties. Cowden took a judgment note from the defendants for $300, and a few days afterwards assigned it to Mrs. Evans as executrix of Josiah W.

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Evans. Cowden collected the principal and interest, paid over the interest, but failed to account for the principal. When he collected the money he was not in possession of the note or the certificate of its entry in the judgment docket. He signed a receipt disclosing the fact that Mrs. Evans was the holder of the claim. The receipt was signed "J. M. Cowden for Anna Evans, Ex." The receipt is not signed as agent, and there is no allegation or proof that Cowden was the authorized general business agent of Mrs. Evans. He put out money for her, telling her where it was placed. He would sometimes collect interest and principal, but in each case sent for her in the settlement. He never collected principal funds to reloan them without her knowledge. She had money to loan, and Cowden appeared for the borrowers and secured the money for them and delivered to Mrs. Evans the securities.

Because he at times collected interest or received principal does not show that she authorized him to do so. If the borrower saw fit to pay over the money to Cowden, when he was not in possession of the securities and could not enter satisfaction for the debt, he did so at his own risk. The testimony indicates that Cowden was the agent of the defendants for the purpose of paying this loan and obtaining satisfaction on the record by Mrs. Evans.

Authority to loan money and take security for its payment implies no authority to collect: Wharton on Agency, Sec. 220.

If money be due upon a written security, it is the duty of the debtor if he pay it to an agent to see that the person to whom the money is paid is in possession of the security or evidence of indebtedness: Story's Equity, Sections 98 and 104.

An attorney or agent who is authorized to make a loan is empowered to receive both principal and interest if the bond or evidence of the debt remains with the agent, but such authority is founded upon his possession of the security and ends when he parts with it: Haines vs. Polilman, 25 N. J. Eq., 183; Williams vs. Walker, 2 Sanford Ch. Rep., 325.

Hard as it may be upon the defendants, we can not relieve them. Where one of two innocent persons must suffer the burden falls upon him who made the fraud possible.

And now, January 2, 1888, the rule to open judgment and let defendants into a defence is discharged.

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Orphans' Court of Philadelphia County.

MURPHEY'S ESTATE.

In a will by which the testator gives to a friend, "for the many acts of kindness shown me, and in fulfillment of promises heretofore made," certain shares of "railroad stock in full," the words "in full" refer to the promise, and the stock is to be taken in full payment of the obligation.

EXCEPTIONS to adjudication.

Samuel B. Murphey died January 30, 1886, leaving a will, which was duly proved. By the said will he bequeathed, *inter alia*, as follows: "Item. I give, devise and bequeath unto my friend, Elizabeth M. Gardiner, for the many acts of kindness shown me and in fulfillment of promises heretofore made, sixty (60) shares of Pennsylvania railroad stock in full."

Upon the adjudication of the account of the executrix the auditing judge decided that the force of the words "in full" was to free the legacy from the payment of the collateral inheritance tax, throwing the burden of payment of said tax upon the residuary estate.

Henry J. Scott, Esq., for exceptants.

J. Henry Williams, Esq, contra.

The opinion of the court was delivered November 26, 1887, by ASHMAN, J.

The gift was as follows: "I give, devise and bequeath unto my friend, Elizabeth M. Gardiner, for the many acts of kindness shown me, and in fulfillment of promises heretofore made, sixty shares of Pennsylvania railroad stock in full." If the words "in full" referred to the legacy, the rule of the English cases, which are collected in Theobald on Wills, 1st ed., 57, and in 1 Jar., 2d ed., 195, note b, that a gift of a clear sum, or of a sum to be paid without deduction, is free from tax, might apply. But the testator had spoken of promises made by him, which may or may not have been evidences of a debt, but which this legacy was intended to fulfill. The reasonable inference, therefore, would seem to be that these promises were the antecedent to which the phrase pointed, and that the shares of stock were to be taken by the legatee in full payment of the testator's obligation. See Holbrook's Est., 44 Leg. Int., 186.

The exceptions are sustained, and the adjudication is modified accordingly.

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Court of Common Pleas of Montgomery County.

THE BURGESS AND TOWN COUNCIL OF CONSHOHOCKEN VS. JAMES FENNEL.

The Burgess and Town Council may enforce an ordinance exacting a license from butchers who sell meats on the streets of the borough, but they can not discriminate between butchers who are residents of the borough and those residing without the limits of the borough unless they show a clear legislative grant to make such discrimination.

David H. Ross, Esq., for plaintiff.

F. L. Murphy, Esq., for defendant.

The facts fully appear in the opinion of the court delivered January 16, 1888, by SWARTZ, P. J.

That the Burgess and Town Council of Conshohocken, under the act of March 22, 1870, P. L. 522, may exact a license fee from butchers who sell their meats upon the streets of the borough, can not be doubted.

The defendant complains that the license is unfair, unreasonable and unjust, because it discriminates between residents of the borough and those living beyond the borough limits.

A borough ordinance must be reasonable, fair, impartial, just, and not oppressive. Unwarranted discrimination can not be allowed: Dillon on Municipal Corporations, Sections 253, 255 and 256.

"An ordinance can not legally be made which contravenes a common right unless the power to do so be plainly conferred by legislative grant." Dillon, Sec. 259.

To sell the meat of cattle slaughtered by the vendor is a common right; not even a mercantile license or tax can be imposed: Com. vs. Dinkelberger, 2 Chester Co. Rep., 384. (Supreme Court case.)

The borough had the legislative grant to interfere with this common right; but because the Legislature gives authority to so contravene a common right is a strong reason why the ordinance shall not in the least transgress the express provisions of the authority to exact licenses. The act of March 22, 1870, does not in any way countenance the discrimination attempted by the borough authorities.

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The ordinance is unfair, partial and unreasonable unless the borough can show some good reason for the discrimination. The case stated gives no such reason, and fails to give any facts sustaining such discrimination.

It is argued that the citizens of the town pay borough and school taxes that outsiders need not pay; this argument can not prevail, for the ordinance, under the legislative authority, is evidently a police regulation and not a revenue measure. If the purpose of the ordinance is to levy taxes on outside residents to aid in the maintenance of the streets of the borough, it is invalid, for each borough or locality is to bear the burden of keeping its own roads in order: Bennett vs. Borough of Birmingham, 7 Casey, 18.

Suppose the residents of the borough do pay a heavier tax; they also enjoy the benefits derived from such taxes.

Nor can the ordinance be sustained by the reasoning adopted in the Borough of Warren vs. Geer, 9 Cent. Rep., 307. In that case there was no effort to discriminate in favor of its own citizens; they, too, were to pay a license unless a mercantile tax was paid. The very purpose of the ordinance was to place all upon the same basis. Here the object is to give a preference to the resident of the borough. The resident butcher pays no mercantile tax, and needs no discrimination to put him on the same footing with outside butchers. In the absence of any reason given to sustain the discrimination we assume none can be given.

Every resident in the borough should be allowed to select the butcher he prefers to patronize; and yet the butcher who pays the heavier license must sell at a higher rate or be deprived of the profits others are making. If by reason of the higher license the butcher charges a higher rate, the customer is put to unnecessary expense or driven to patronize a less desirable dealer.

"If an ordinance is unequal, oppressive and unjust, if it be not a legitimate regulation of the vending of meats but partial and unfair establishing monopolies or subjecting either the seller or the purchaser to unnecessary inconvenience or expense, it certainly should not be upheld." St. Louis vs. Weber, 14 Mo., 547.

An ordinance which forbade the sale of goods on Sunday but excepted from its operations those who kept their business places closed on Saturday, was held unconstitutional because it discrimi-

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nated unfairly in favor of Jews: City of Shreveport vs. Levy, 36 La., 671.

An ordinance providing for the issuing of a license to any inhabitant of a town permitting him to fish in the navigable stream flowing through the town is valid except so far as it excludes inhabitants of other towns from securing such license: Hayden vs. Noyes, 5 Conn., 391.

An ordinance which imposed a license of one hundred dollars on merchants selling goods stored in the city limits or *in transitu* to the city, and a license of two thousand dollars on merchants or persons selling goods not stored in the city nor *in transitu* to the city, was held invalid because unjust, unequal and unfair: Ex parte Frank, 52 Cal., 606. This was known as the "sample sellers' order," and its purpose was to discriminate in favor of the resident merchants as against others who came from without the city to sell similar wares not actually in the city.

This ordinance was not as unjust as the Conshohocken system of licensing, for here two butchers, occupying the same street, selling the same kind of goods—that is, wares made valuable by their own labors—pay different licenses, one twice as much as the other.

Discriminations and monopolies are unjust and can not be sustained by reason or fact, and unless the Legislature by a clear enactment justifies them they must not prevail. Why a resident of the borough of Conshohocken should pay a license of five dollars to sell the necessaries of life and enjoy the privileges that another could secure only upon the payment of ten dollars is difficult to understand.

And now, January 16, 1888, judgment is entered in favor of the defendant with costs of suit upon the case stated.

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WEST POINT TURNPIKE ROAD COMPANY VS. HENRY W. MOYER.

The method of increasing the capital stock of a corporation is pointed out by Sections 16 and 17 of the act of April 29, 1874; any other method than that therein laid down is void, and any resolution of the stockholders increasing the stock or making an assessment thereon is void and can not be collected.

CASE stated.

Theo. W. Bean, Esq., for plaintiff.

Walter S. Jennings, Esq, for defendant.

The opinion of the court was delivered January 5, 1888, by YERKES, P. J. (Swartz, P. J., of Montgomery, having been of counsel).

It is impossible to divide the resolution of the stockholders' meeting without doing violence to their solemn act and disregarding their clear intention.

It is plain that what they undertook to do was not to make an assessment upon each share of issued stock, thereby increasing the value of the same the amount of the assessment, but to create one hundred and nine additional shares of stock upon an ostensible valuation of nine dollars per share, when the actual value would be eighteen dollars per share. The effect would be to increase the capital stock beyond the limit fixed by law.

Unless the new stock should be given a face value of twenty-five dollars per share, there would be an issue of two classes of stock. There is a method by which this can be done—Sec. 16 and 17, act of April 29, 1874, and Sec. 4, act of April 17, 1876, P. L. 4—but it is not that pursued by this corporation.

The manner of increasing the capital stock of a corporation is also provided by Sec. 18 of the act of 1874, and it may be that the purpose was to comply with this provision in this instance. But, unfortunately, the amount of increase exceeds the limit fixed by the charter, and it follows that, irrespective of what the intention may have been, the increase of stock as provided for by the resolution is in violation of Art. XVI, Sec. 7, of the Constitution, and of Sec. 4 of the act of 1876, P. L. 32, and is therefore void.

The only way by which a stockholder can be required to increase his holdings in a corporation is by assessments regularly made; but when stockholders undertake to make a fictitious increase of stock under the cloak of an assessment, it is against the policy of the law as well as its distinct inhibition, and it can not

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give aid or countenance to an illegal project by a partial enforcement against a dissenting member and treating the illegal part as surplusage. The intent was to issue additional stock, but the effort should have been confined to the lawful limit.

The proper proceeding for an assessment is pointed out by the act. The act of 1874 contemplates that each chartered company shall have a certain amount of capital stock divided into shares not exceeding one hundred dollars each, to be fixed by the charter.

The charter of the West Point Turnpike Road Company provides for one hundred and forty shares of capital stock of the value of twenty-five dollars per share. When the defendant subscribed for his stock and became a member of the corporation it was upon the implied understanding that the entire amount should be subscribed for. The burden which he assumed was in relation to that number of shares taken up. It is manifestly unfair and inequitable that he should be subjected to an assessment nearly equal to the original subscription, when a large amount of the capital stock had not been sold. He never intended to assume such a burden. It is evident that the company contemplated disposing of the entire amount of capital stock before resorting to an assessment under the act, but, unfortunately, they bungled and exceeded their authority. We see no remedy but to begin anew.

And now, January 5, 1888, judgment is directed to be entered in favor of the defendant with costs.

Supreme Court of Pennsylvania.

In re Change of Limits of Borough of Pottstown.

The act of June 11, 1879, P. L. 150, entitled "A supplement to an act for the regulation of boroughs, approved the third day of April, Anno Domini one thousand eight hundred and fifty-one, and providing for the annexation of adjacent territory to boroughs, *held* to be constitutional; as also the act of May 17, 1883, P. L. 36, extending the provisions of the act of 1879 to all the boroughs of the commonwealth.

Certiorari to the Court of Quarter Sessions of Montgomery county.

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Pottstown Borough.

The facts of this case fully appear from the opinions of the court below, reported in full in 1 MONTGOMERY COUNTY LAW REPORTER, 161 and 189.

Henry K. Weand and *H. B. Dickinson, Esqs.*, for appellants.

Miller D. Evans and *J. Wright Apple, Esqs.*, for appellees.

The opinion of the Supreme Court was delivered by Mr. JUSTICE CLARK.

This writ of certiorari brings up the record of the Court of Quarter Sessions of Montgomery county in a proceeding instituted under act of June 11, 1879, P. L. 150, and the amendatory act of March 17, 1883, P. L. 36, to change the limits of the borough of Pottstown. The borough of Pottstown was incorporated by a special provision in the act of February 6, 1815, P. L. 247, and has never been subject to the provisions of the revised and general borough law of April 3, 1851.

The act of June 11, 1879, is a supplement to the general borough law, and by its express terms applies to a change of limits of any borough incorporated under the general statute, therefore, to a part only of the existing boroughs in the commonwealth. On part of the plaintiffs in error it is contended that this act of 1879 is in conflict with the third section of the third article of the Constitution in this that the subject of the statute is not clearly expressed in its title; and also with the seventh section of the same article in that it is in effect a local and special law "regulating the affairs of boroughs."

The general act of 1851 is entitled "An act for the regulation of boroughs," and was intended to furnish a uniform and general system for the purpose stated. It provides for their incorporation, for the extension of their limits, and for the election of corporate officers; it defines the corporate powers, designates the duties of the corporate officers, and sets forth in the most comprehensive manner the rules and restrictions which shall govern in the affairs of the municipality. The title, it must be conceded, completely covers the subject and design of the statute; it is "An act for the regulation of boroughs." Under this act the incorporation of boroughs by the Court of Quarter Sessions is authorized, "without regard to population, and the Burgess and Town Council were therein authorized upon the petition of any number not less than twenty of the free-

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hold owners of lots or outlots, or other tracts of land in any section lying adjacent to said borough, to declare by ordinance the admission of the section on which such petitioners and others reside."

The act of 1879 is entitled "A supplement to an act for the regulation of boroughs, approved," etc., and the specific subject of the act is the mode of changing the limits of boroughs incorporated under the act of 1851, to which it is supplementary, in the annexation of adjacent territory. When the change of limits involves a contraction of lines the proceeding is under the third section of the act of April 1, 1834: McFate's Appeal, 105 Penna., 323; Darby vs. Sharon Hill, 112 Penna., 66.

The act of 1879 provides that jurisdiction shall be exercised in the change of borough limits by the Court of Quarter Sessions of the proper county, and not by the Burgess and Town Council, as prescribed by the act of 1851; that the application shall be in writing, "signed by a majority of the freeholders residing within the limits to be annexed"; that the court shall cause it to be laid before the grand jury when in session, etc.

Thus it will be seen that the supplement is not foreign but cognate not only to the title but also to the subject of the original statute. The title to the act of 1851, although expressed in general terms as "An act for the regulation of boroughs," as we have already said, completely covers the subject of the enactment; and, this being so, an act entitled "A supplement thereto" has a sufficient title to cover any matter within the purview of the original, and which might properly have been embraced therein. The third section of the third article of the Constitution requires that "the subject of a statute shall be clearly expressed in the title." The title must not only embrace the subject of the proposed legislation but must express the same so clearly and fully as to give notice of the legislative purpose to those who may be especially interested: Phœnixville Road, 42 Leg. Int., 313. But in the case of a supplement, where the subject of the original act is sufficiently expressed in its title, and where the provisions of the supplement are germane to the subject of the original, the true rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, and declares it to be a supplement thereto: State Line and Juniata R. R. Co.'s Appeal, 77 Penna., 429.

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It is said that the inhabitants of the townships are injuriously affected by this legislation, as the withdrawal of the territory affects the division of the townships into convenient school districts, withdraws valuable property from taxation for township purposes, etc.; but this was equally so under the act of 1851. The application under either act must come from the inhabitants or residents of the territory proposed to be annexed; and certainly the townships can not complain that the question of annexation is withdrawn from the arbitrary action of the Burgess and Councils and submitted to the Court of Quarter Sessions, where all parties are assured of a day in court, and a full and fair adjudication made under the law. We are of opinion that the subject of the act of 1879 is fully expressed in its title, and that it is not in conflict with the Constitution on that ground.

Is it a local or special law regulating the affairs of boroughs, and therefore in conflict with the seventh section of the same article? It must be conceded that it does not apply to all boroughs by its express terms. It has application to such only of them as were originally incorporated under the act of 1851. It is contended, however, on the part of the appellees, that the several boroughs incorporated under the act of 1851 constitute a well defined class of boroughs, as distinguished from another class incorporated either by special charter or under previous general laws; and that under the doctrine declared in Wheeler vs. Philadelphia, 77 Penna., 338, a statute which relates to persons or things as a class is a general law, whilst a statute which relates to particular persons or things of a class is special and comes within the constitutional prohibition. We are happily relieved, however, from the decision of this question. The act of June 11, 1879, was afterwards amended by an act approved May 17, 1883, P. L. 36. The amendatory act is in the words and form following: "Be it enacted, &c., That the first section of an act of Assembly, approved the eleventh day of June, Anno Domini one thousand eight hundred and seventy-nine, entitled 'A supplement to an act for the regulation of boroughs, approved the third day of April, 1851,' and which is as follows, 'That the several Courts of Quarter Sessions within this commonwealth, by and with the concurrence of the grand jury of the county, shall have power to change the limits of any borough incorporated under the act to which this is a supplement, and to decree such alterations as may be necessary and expedient,' be so amended as to read, 'That the several Courts

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of Quarter Sessions within this commonwealth, by and with the concurrence of the grand jury of the county, shall have power to change the limits of any incorporated borough within this commonwealth.'" This act of May 17, 1883, has not been subject to any constitutional criticism; it is a literal re-enactment in terms of the first section of the act of 1879, giving the provisions of that section general application throughout the state to all the boroughs thereof.

From and after May 17, 1883, therefore, the several Courts of Quarter Sessions within the commonwealth, by and with the concurrence of the grand jury, had undoubted power to change the limits of any incorporated borough within the commonwealth. The proceedings in this case were commenced June 1, 1885, in the proper court, and the decree can not be successfully assailed for want of constitutional power in the court to make it. What has been said disposes of the first and third assignments of error.

The second assignment can not be sustained. The facts upon which the challenges were made do not appear upon the record by bill of exceptions or otherwise. The record shows simply that the challenges were made and overruled. No exceptions appear to have been taken.

The fourth assignment is without merit. The court will be presumed to have discharged its duty *omnia rite esse acta præsummatur.*

We find no error in the record, and therefore the proceedings of the Quarter Sessions are affirmed.

Margaretta Alexander's Appeal.

A and B agreed to exchange farms, A's to be clear and B's farm to be subject to $2700 mortgage. Both entered into immediate possession. B tendered a conveyance, which was subject to a mortgage of $2,754 and interest accrued during the time A had been in possession, which conveyance A refused. *Held*, B could not compel specific performance, especially as subsequently B's property was sold by Sheriff under said mortgage.

Appeal from the decree in equity of the Court of Common Pleas of Montgomery county in a bill for specific performance of a written contract to sell and convey land, between John Wunderlich, complainant, and Margaretta Alexander, defendant.

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Alexander's Appeal.

The facts of the case are sufficiently set forth in the opinion of the court.

Charles Hunsicker, Esq., for appellant.

Courts of equity will only execute the contracts of parties, and not make new ones: Parrish vs. Koons, 2 Parsons, 97; P. & R. R. Co. vs. Lehigh Nav. Co., 36 Penna. S. R., 211; Harris vs. Knickerbocker, 5 Wendell, 649.

Written instruments can only be varied upon parol evidence, where fraud, accident or mistake appear in their execution: Martin vs. Berens, 97 Penna. S. R., 463; Bowman vs. Tagg, 19 W. N. C., 148.

To obtain a decree the plaintiff must show himself prompt, eager and ready: Tiernan vs. Roland, 15 Penna. S. R., 438; Miller vs. Hanlan, 51 Id., 265.

No decree will be made if the circumstances of the parties have changed or if performance be impossible: Elbert vs. O'Neill, 102 Penna. S. R., 305; Tiernan vs. Roland, *supra;* Fry on Specific Performance, 375–389.

It is discretionary with the court, and will only be granted when the equity is with the plaintiff.

Wm. F. Dannehower, Esq., for appellee.

The opinion of the Supreme Court was delivered February 13, 1888, by Mr. JUSTICE STERRETT.

Neither of the contracts in question contains any reference to the other, and thus upon their face they appear to be separate and independent; but upon the evidence before him the learned master has rightly found that they are, in effect, interdependent parts of a single contract for an exchange of the properties therein described.

According to the terms of their agreement, the parties respectively took possession of the property each was to receive, having first receipted to each other for two hundred and fifty dollars on account. Nothing more remained to be done until October 1, 1884, when appellant was to have conveyed her farm to appellee "in fee "simple free from all incumbrances, dower and right of dower," and appellee was to have conveyed his farm to Edward R. Fellows, the son-in-law and appointee of appellant, subject to a mortgage of twenty-seven hundred dollars.

That sum is the exact difference between the valuations of the respective properties agreed upon by the parties as the basis of ex-

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change—the one being valued at eighteen hundred dollars, the other at forty-five hundred dollars. If the conveyances had been executed and delivered as contemplated by the parties, the contract would have been fully executed; but that was not done.

At the time and place appointed for exchange of conveyances, etc., appellant was present and ready to perform her part of the contract, but appellee failed to appear. The result was delay; but inasmuch as time was not of the essence of the contract, he might have offered to perform his part of the agreement within a reasonable time thereafter, and thus put himself in a position to have demanded a deed from appellant.

Subsequently, on November 15, 1884, he did tender a conveyance, but instead of being subject to a mortgage of $2,700, as required by the agreement, it was subject to an incumbrance of $2,754 and accrued interest, amounting in all to about $2,836. In the meantime, October 23, 1884, Fellows, to whom the land was to have been conveyed, brought suit to recover damages for appellee's failure to convey.

The deed tendered by appellee, as above stated, was refused by both Fellows and appellant. Neither of them was bound to accept it, for the obvious reason that it was subject to a greater incumbrance than either of them had agreed to assume. Without further offer to comply with his part of the contract, appellee afterwards filed his bill against appellant for specific performance of her contract. While the case was pending before the master a scire facias on the mortgage was issued and on the judgment obtained for $3,053.27, debt, past due interest, etc., the land was sold and conveyed by the Sheriff to the plaintiff in the writ. To these foreclosure proceedings neither appellant nor her son-in-law, Fellows, was made a party.

The question is whether upon the facts, of which the foregoing is an outline, the decree of the court below can be sustained. We are of opinion that it can not, for the reason that appellee never performed or offered to perform his part of the contract according to its true intent and meaning; and for the further reason that in the meantime, and without appellant's fault, the circumstances of the parties have so changed that it is no longer in the power of the appellee to convey the land as he agreed to do, and hence it would be inequitable to require appellant to convey her land and accept in return therefor such a deed as the decree contemplates.

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Specific performance of contracts for sale or exchange and conveyance of land is never a matter of right, but always of grace; but whether of right or of grace, it would certainly be most unjust and inequitable to decree specific performance of a contract for exchange of lands against the party who at the appointed time was ready and willing to perform, and in favor of the other party, who was not only in default but has never offered to perform according to the terms of his contract, and whose laches have rendered performance on his part impossible. Such a party should be remitted to his rights at law, if he has any.

It will not do to say the parties intended the conveyance of the farm in question to Fellows to be subject to the mortgage as it then stood upon the record, $2,754 and accrued interest, or that it is not unreasonable to require the party in possession to pay the accrued and accruing interest, etc. An all sufficient answer to such suggestions is that the parties did not so agree. It is the business of courts both of law and equity to enforce, not to make contracts. If any provision of the agreement under consideration is clear and explicit it is that the farm was to be conveyed to Fellows on October 1st, subject to a mortgage incumbrance of $2,700, and no more. It is not alleged there was any mistake as to the amount. As we have seen, that was the difference in the values of the respective properties agreed upon as the basis of the exchange. The mode of adjusting that difference was by conveying on the 1st of October ensuing, the date of agreement, subject to that exact sum. Whether the excess over the sum named be much or little, the court has no right to impose the payment thereof on the party who never agreed to assume it. The principles of equity, applicable to the facts of this case, are elementary, and hence citations of authority are unnecessary.

Decree reversed and bill dismissed, with costs to be paid by the appellee.

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COZENS VS. MIDDLETON.

C., the defendant, loaned to F. his credit as endorser upon a negotiable accommodation note for the sole and exclusive purpose, as was alleged, of enabling F. to settle with a certain firm who threatened to file a mechanics' lien against F. The proposed settlement was not effected; and F. retained the note and passed it over to the plaintiff, M., before maturity, on account of F.'s indebtedness to him, and in exchange for a promissory note previously given to plaintiff by F. alone. *Held*, that as the facts showed that the plaintiff had received both notes, not in payment of but as collateral to an antecedent debt, the defendant could set up F.'s fraud upon him in the misuse of the note in suit as a good defence against the plaintiff, even if the latter took the note without notice of the equities between the original parties to it; provided, the jury believed from the evidence that such restriction as to its use actually existed.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of the case as well as the charge of the court below, BOYER, P. J., will be found reported in 2 MONTGOMERY COUNTY LAW REPORTER, 182.

The assignments in error were seven. The first assignment is specifically set out in the opinion of the court.

The second specification of error is: The court erred in answering the defendant's fifth point as follows: "This is true if the jury also find as before stated, that the note was not given to be used by Fulmor at his discretion, but solely for the purpose of settlement with E. P. Allis & Co. But if, after the settlement with E. P. Allis & Co. failed, the note was left in Fulmor's possession to be used by him for general purposes, the defendant would be bound." The rest of the assignments of error were to the several portions of the charge of the court below.

Franklin March and *N. H. Larzelere, Esqs.*, for plaintiff in error.

The plaintiff held this note as collateral security for an antecedent debt; he was not therefore in the position of a holder for value.

Appeal of Liggett Spring Co., 111 Penna. S. R., 291.

Maynard vs. Bank, 98 Id., 250.

Hunter vs. Moul, Id., 13.

Kirkpatrick vs. Murhead, 16 Id., 117.

Smith vs. Association, 93 Id., 19.

A fraudulent use was made of the note. Defendant can defend on that ground.

Denniston vs. Bocon, 10 Johns., 198.

Kassen vs. Smith, 8 Wend., 437.

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Roye vs. Bank, 4 W. N. C., 359.
Sitgreaves vs. Bank, 13 Wr., 359.
Carpenter vs. Bank, 15 W. N. C., 523.
Bardsley vs. Delp, 7 Norris, 420.

Charles Hunsicker, Esq., for defendant in error.

Philips vs. Meily, 16 W. N. C., 429.
Hill vs. Gaw, 4 Barr, 493.
Anspack vs. Bast, 2 P. F. S., 356.
Hacker vs. Oil Co., 23 Id., 93.

The opinion of the Supreme Court was delivered February 13, 1888, by Mr. JUSTICE STERRETT.

The note in suit, after being endorsed by the payee, defendant below, was returned to the maker, who afterwards and before maturity transferred it to plaintiff below for an antecedent debt, but whether in payment thereof or merely as collateral security was a disputed question.

In taking the note directly from the maker with the words "credit the drawer" written on the lower left hand corner, and signed by the payee, plaintiff below is presumed to have known it was an accommodation endorsement, and therefore without consideration as between the maker and payee; but that fact without more would be no defence: Appleton vs. Donaldson, 3 Penna. S. R., 381; Lord vs. Ocean Bank, 20 Id., 384; Twining vs. Hunt, 7 W. N. C., 223; Carpenter vs. Bank of the Republic, 106 Penna. S. R., 170; and cases there cited. The doctrine of these and other cases is that an accommodation endorser of negotiable paper, pledged by the maker for an antecedent debt, can not defend on the ground that his endorsement was without consideration, because that would defeat the purpose for which he loaned his credit; but he may successfully defend by proving to the satisfaction of the jury that his endorsement was fraudulently procured, or that instead of being a general and unrestricted loan of credit the endorsement was made for a specific purpose, and that without his knowledge or consent the note was fraudulently used for another and entirely different purpose, and the like; but as against a *bona fide* holder for value, without notice, no such defence is available. In Lord vs. Ocean Bank, *supra*, which was the case of an accommodation maker, it is said: "He who chooses to put himself in the front of a negotiable instrument, for the benefit

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of his friend, must abide the consequences if his friend accommodates himself by pledging it for an old debt, than if he had used it any other way."

An accommodation endorsement is *prima facie* a loan of the endorser's credit without restriction, but it may be shown to have been otherwise understood by the parties. In this case defendant below denied that the endorsement in question was an unrestricted loan of his credit, and undertook to prove by his own testimony and that of the maker that the note was endorsed for the specific purpose of being used by the latter in the settlement of a certain claim, and for no other purpose whatever; that after it ceased to be available for that purpose the maker wrongfully and without defendant's knowledge and consent transferred it to plaintiff below as collateral security for an antecedent debt. In view of this evidence the court was requested to charge: "If the jury find that the defendant loaned the note in suit to Fulmor for the specific purpose to use it in settlement of E. P. Allis & Co.'s claim, and for no other purpose, then when that purpose failed it was dead in law and belonged absolutely to defendant; and any subsequent use by Fulmor of said note without the knowledge, consent and concurrence of the defendant was a fraud upon the rights of the defendant." The answer of the learned Judge was as follows: "This is true if the jury find that when the defendant gave the note to Fulmor it was expressly restricted to the settlement with E. P. Allis & Co."

It is contended that this answer, with the exception of the first three words, is erroneous; but we are unable to see wherein it is so. It is a mistake to call it a qualification of the affirmance, or to claim that it was prejudical to the defendant below. The legal conclusion, stated in the point, necessarily depended on the facts the jury was asked to find, and it was certainly not improper in affirming the point to call their attention to the principal question of fact upon which it was necessary for them to pass. That question, as well as others presented by the evidence, was exclusively for their consideration and determination under all the evidence in the case, including the rebutting testimony offered for the purpose of showing a different state of facts. If the jury made a mistake in not finding according to the weight of the evidence before them, the error is one which we are powerless to correct. The only remedy was an appeal to the discretionary power of the court to set aside the ver-

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dict and order a new trial. The court refused to exercise that discretion, presumably for the reason that on all the questions of fact involved in the case the verdict was fully warranted by the evidence. The first specification of error is not sustained.

The second specification is not according to rule, but waiving that the answer to the point referred to was entirely proper.

What was said by the learned Judge in those portions of his charge which constitute the third, sixth and seventh specifications respectively, was clearly warranted by the evidence. Special reference has already been made to the questions of fact upon which defendant below mainly relied; but there were others upon which it might become necessary for the jury to pass in making up their verdict. These questions were all properly presented and fairly submitted to the jury.

The fourth and fifth specifications are not according to rule, and therefore not entitled to further notice. There appears to be no error in the record.

Judgment affirmed.

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Court of Common Pleas of Montgomery County.

COMMONWEALTH EX REL. ENGARD VS. COMMISSIONERS OF MONTGOMERY COUNTY.

IN EQUITY.

Liability of a county to rebuild abandoned turnpike road bridges.
Construction of act of June 8, 1881, P. L. 67, requiring County Commissioners to rebuild bridges when destroyed, etc.

PETITION for mandamus.

James B. Holland, Esq, for respondents.

The facts are fully disclosed in the opinion of the court delivered February 20, 1888, by WEAND, J.

This case comes before us on petition, answer, demurrer and joinder thereto.

The petition for a mandamus alleges that a bridge over the Wissahickon creek where it crosses the Wissahickon turnpike road, which forms the boundary line of Springfield township in Montgomery county and the county of Philadelphia, was destroyed by fire on or about July 1, 1887, and that since said date the road has been impassable by reason thereof; that the Commissioners of Montgomery county have taken upon themselves the burden of rebuilding said bridge, recognizing the necessity therefor, but have neglected to complete the same, and therefore asking for a peremptory mandamus to compel said Commissioners to restore the road to public travel by the erection of a bridge. The bridge was originally part of the turnpike road.

The answer to the alternative writ of mandamus does not deny the abandonment of the road by the turnpike company nor the necessity for the erection of the bridge, but denies the liability of Montgomery county in the premises by reason of anything alleged in the petition; and we are therefore called upon to decide the question as to whether under existing legislation the county is liable in the first instance to erect bridges of this character. It is plain that the county can only be responsible for bridges, either for their origi-

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nal construction or subsequent repair, where such duty and obligation is imposed upon them by express authority of law. Unless the relators, therefore, can show some duty thus imposed, this mandamus can not issue.

It is conceded that the public are entitled to have this road restored to travel, and that some one is liable for neglect of duty in not supplying a bridge in place of the one destroyed; but this fact alone does not fix the party charged with the responsibility, and we must therefore turn to the acts of Assembly regulating the building of bridges in order to determine the question at issue. We have no information as to the extent, size or probable cost of the proposed structure, and must therefore regard it as a part of the road. As was said by Judge Agnew in Rapho vs. Moore, 18 P. F. S., 404: "As a general proposition, but by no means universal, bridges are treated as portions of the highways which cross them, and are to be maintained by the same persons to whom the duty of repairing the highways is committed. In this state the duty is statutory, and therefore we must look to the statute for its nature and extent."

By the eighth section of the act of April 19, 1844, P. L. 315, Purd. Dig., page 1504, pl. 61, it is provided: "That in case of the abandonment for any length of time, or of the condemnation * * of the whole or any part of any turnpike road in this commonwealth, except the Susquehanna and Tioga turnpike, it shall be the duty of the supervisors of each township through which the same may pass forthwith to take charge of and put in good order and repair any part of such road as may be in their respective townships, and from time to time maintain and keep in good order all such parts of said road in the same manner as if the same were a county road; and in case of a failure to do so shall be liable to all the provisions of law which relate to county roads." And by the ninth section provision is made for repayment of moneys expended by the township in case such turnpike company shall reclaim the road.

If no bridge had been a part of this road, it can not be claimed that the county would in any event be liable for the care or repair of the road itself. Why then shall it be chargeable with the bridge? The act of Assembly of June 13, 1836, Section 35, provides for a case where a bridge is too expensive for a township or townships to bear; but in this proceeding there is no allegation that such is the fact, nor are we informed as to what such expense would be

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And we have nothing before us to determine as to whether this bridge should not be treated as part of the highway, the duty of maintaining which is cast upon the township, no proceedings having been taken under the act of 1836 above cited. By the forty-sixth section of the same act, bridges over any river, creek or rivulet, being on the line of adjoining *counties*, shall be authorized in the manner provided in the case of other county bridges, etc. From the above citations it will appear that the county of Montgomery was not liable for the care, maintenance and repair of said bridge in the absence of the necessary steps to fasten it with such liability; conceding that the expense was too great for the township to bear, yet the prerequisites to make it so liable not having been complied with, no duty devolved upon the county: Rigner vs. County of Schuylkill, 103 Penna. St. R., 382.

It is, however, claimed that the county is liable by virtue of the act of June 8, 1881, Section 1, P. L. 67, Purd. Dig., 1509, pl. 99, which reads as follows: "The County Commissioners of the several counties of this commonwealth are hereby authorized to take charge of and rebuild and reconstruct any bridge that was owned and maintained by corporations, when the same was destroyed by ice or otherwise and abandoned by the owners of said bridge, if in their judgment a bridge is necessary for the accommodation of the traveling public; and where such bridge crosses a stream forming the boundary line between two counties, then the Commissioners of the respective counties are hereby authorized to jointly reconstruct and maintain such bridge as a county bridge."

Keeping in view the theory of all previous legislation, that a county is only to become liable for a bridge where the cost is too great for townships to bear, we can not say that this act was intended to repeal all former legislation and impose the duty upon the county in all cases where a bridge built and abandoned by a corporation has been destroyed. If we did so construe the law, the county would be liable for a bridge costing but a few dollars as well as for those costing large amounts, whilst the townships would still continue liable for the repairs of the balance of the road, which in many cases might be far in excess of that to be assumed by the county. This would seem to be an inconsistency and absurdity, and there would seem to be no more propriety in relieving the township in the one

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case than the other if the question of cost is not to be taken into consideration.

What then what was the purpose of the act of 1881? We can find the true answer to this question only by a review of the previous legislation upon this subject in order to ascertain the old law, the mischief, and the remedy.

The act of June 13, 1836, Section 35, P. L. 560, Purd. Dig., 1505, pl. 56 and 57, provides for the erecting of bridges by the county when the erection of such bridges "require more expense than it is reasonable that one or two townships should bear," etc., and a method is pointed out to establish the fact and fasten the responsibility upon the county; and in Section 46 of the same act provision is made for cases where the bridge is over any river, creek or rivulet being on the line of adjoining counties.

By the act of April 19, 1844, Section 8, P. L. 315, Purd. Dig., 1504, pl. 61, provision is made in cases of abandonment or condemnation of *turnpike* roads, in which cases each township through which the road passes shall forthwith take charge of and put in repair and keep in good order the road so far as it may be in such township in the same manner as if the same were county roads, etc.; and the supervisors are to keep an account of the expense, to be repaid by the company when they resume control of the road.

By the act of April 15, 1869, P. L. 46, Purd. Dig., 1508, pl. 89, provision is made for the construction of embankments or causeways leading to bridges where the expense is more than the township should bear.

By the act of April 5, 1870, Section 2, P. L. 48, Purd. Dig., 1668, pl. 26, provision is made for the abandonment of turnpike or *plank roads*, or in case they are not kept in good order and repair, in which case the supervisors are required to take charge of said roads until the company shall pay all sums expended by the township.

The act of May 8, 1876, Section 1, P. L. 131, Purd. Dig., 1508, pl. 92 to 98, provides for cases where bridges erected by turnpike road or *bridge* companies or other corporations have erected bridges which it is desired should be freed from tolls.

The act of June 11, 1879, Section 1, P. L. 146, Purd. Dig., 1509, pl. 101, provides for cases where the expense is too great for the township to bear and under which the cost can be apportioned without making the same a county bridge.

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Now, unless the act of 1881 was intended to repeal all this legislation by making the county liable in the first instance for all bridges owned and maintained by corporations which had been destroyed, without reference to cost, and thus to relieve the townships from the particular burden, we must give it a restricted construction and endeavor to find some omission in former laws which this act was intended to supply, for as ample provision was made for fastening this liability upon the county in the cases mentioned in the above cited acts it is fair to presume that the Legislature had in view some other and different class of bridges.

We have, therefore (1) provision for new bridges, act of 1836; (2) for abandoned turnpike roads, act of 1844; (3) for the abandonment of turnpike or plank road companies or neglect to keep in repair, act of April 15, 1870; (4) where turnpike road companies, bridge companies or other corporations had erected *toll bridges* and it was desired to render them free from tolls, act of May 8, 1876; leaving unprovided for but one other class, viz., where a bridge was erected by a company and unconnected with a turnpike or plank road company, and afterwards abandoned. In this case no provision had been made for the care, charge or re-erection of the structure by any previous law, and it is to this class of cases that we think the act of 1881 was intended to apply. Giving the act this restricted force and application we have a complete system and remedy covering all cases which can arise. As in such case no road is connected with the bridge, the township was not liable nor was there any provision for compelling the county to assume the burden.

It will be noticed that the act refers specifically to bridges owned and maintained by corporations, whereas all former laws on the subject refer to turnpike or plank road companies, thus showing that the Legislature had in view a new and different condition of affairs from those formerly provided for. We have in this county many miles of abandoned turnpike roads, and in connection therewith many abandoned bridges in the different townships through which these roads run. No complaint has heretofore been made by the townships because of the expense of maintaining these bridges. The effect of a ruling asked for in this case will subject the county on the complaint of any citizen to maintain all these bridges when destroyed, a contingency which we think was never intended by the passage of the

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act in question. Under former laws the acquiesence of the grand jury, court and county commissioners must concur before the county can be charged with bridges, but here all these valuable checks are removed—certainly unwise legislation, even if intended.

In thus arriving at our conclusions we are doing no injustice to Springfield township, for if it is charged with the duty of erecting this bridge, and the cost should be more than it ought to bear, ample provision is made for its relief. Nor are we violating any of the cardinal rules for the construction of statutes, for as was said by Judge Sharswood in Erie vs. Bootz, 22 P. F. S., 196: "Implied repeals are not favored. If two statutes can stand together the posterior does not abrogate the prior. The whole course of legislation, like the whole of a deed or other instrument of private parties, is to be so construed that every part and every word shall have its effect, if it consistently can, and thus the will of the Legislature be completely carried into execution." And as was said by Judge Bell in Cadbury vs. Durell, 10 Barr, 265: "That legislative enactments are to be expounded as near to the use and reason of the prior law as may be, when this can be done without violation of its obvious meaning; for, say the cases, it is not to be presumed the Legislature intended to make any innovation upon the common law further than the case absolutely required."

And now, February 20, 1888, this cause came on for hearing and was fully argued by counsel, whereupon the court, after due consideration, do order and adjudge that judgment be entered upon the demurrer for the respondents.

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Supreme Court of Pennsylvania.

BUGGER VS. CRESSWELL AND WIFE.

R. being the contractor for the erection of a building for C. procured the signatures of some of the sub-contractors to an instrument guaranteeing the owner of the building against liens for work and materials ordered by the contractor; but with the verbal understanding that the same should not be binding upon any unless signed by all the sub-contractors. Two of them refused to sign, and it was handed over to C. as it stood, with the signature of the plaintiffs attached. *Held*, that the instrument was binding upon those who did sign it unless C. had notice of the arrangement between R. and them before the payment of money to R. upon the faith of the instrument.

ERROR to the Court of Common Pleas of Montgomery county.

The facts in this case were exactly similar to those in the case of Slack & Brother vs. Cresswell and Wife: 2 MONTGOMERY COUNTY LAW REPORTER, 145.

Charles H. Stinson, Esq., for plaintiff.

Henry C. Boyer, Esq., for defendant.

The opinion of the Supreme Court was delivered March 5, 1888.

PER CURIAM.—The attempted reformation of the contract of the 14th of September, 1883, was a signal failure. Where there is oath against oath, as in this case, a chancellor invariably refuses to interfere. Independently of this the circumstances are all opposed to the theory of the plaintiff.

Judgment affirmed.

APPEAL OF S. S. CAMPBELL AND WIFE.

A land owner who petitions for the appointment of viewers under the provisions of the general railroad law for the assessment of damages to him for injuries sustained or likely to be sustained from the occupancy of his land as proposed by a railroad company, and accepts the sum awarded by the viewers, and receives the money, can not afterwards maintain a bill in equity against the railroad company to compel them to cross his land in some other manner, even although originally he had such a right.

It is the duty of viewers appointed to assess damages under the general railroad law to estimate the injuries sustained or likely to be sustained by the petitioner from the occupation of his land according to the declared plan of the railroad company, without reference to questions of their right to cross in the particular manner indicated by their plan as submitted and filed.

CERTIORARI to the decree of the Court of Common Pleas of Montgomery county, in equity, in the case of S. S. Campbell and Caroline G. his wife, in right of said Caroline, complainants below and appellants, vs. Pennsylvania Schuylkill Valley Railroad Company, defendants below and appellees.

The facts of the case, as well as the opinion of the court below by BOYER, P. J., is reported in full in Campbell vs. R. R. Co., 2 MONTGOMERY COUNTY LAW REPORTER, 139.

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Perry's Appeal.

G. R. Fox & Son, Esqs., for appellants.

Charles H. Stinson, Esq., for appellees.

The opinion of the Supreme Court was delivered March 5, 1888.

PER CURIAM.—When the assessments of damages in this case were made, every injury to the appellant's land, or to any and every right connected therewith, was or ought to have been considered. Hence we must take it that the damage done to the right of way to the public road was considered and disposed of. This leaves them without personal cause of complaint concerning the obstruction of the public highway. And if the community has such cause, its officers must be the ones to complain and not private persons.

The decree is affirmed and the appeal dismissed at the cost of the appellants.

APPEAL OF JOHN PERRY ET AL.

An appellant from the report of viewers, in a proceeding to appropriate private property under the general railroad law of 1849 and its supplements, is not required to pay costs or enter into a recognizance for the payment thereof as a condition of the right to appeal.

CERTIORARI to the Court of Common Pleas of Montgomery county to review the action of the court in refusing to strike off the appeal from an award of viewers in a proceeding to appropriate private property under the general railroad laws.

The facts of this case, as well as the opinion of the court below by BOYER, P. J., will be found in full in Perry et al. vs. Pennsylvania Schuylkill Valley Railroad Company, 3 MONTGOMERY COUNTY LAW REPORTER, 43.

Theo. W. Bean, Esq., for appellants.

Charles H. Stinson, Esq., for appellees.

An exactly similar case to this has been decided by this court in the recent case of Gettysburg Battle-field Memorial Association vs. John L. Sherfy, 9 Cent. Rep., 156.

The opinion of the Supreme Court was delivered March 5, 1888.

PER CURIAM.—The appeal in this case is dismissed and the decree affirmed at the cost of appellants for reasons which will be found in the case of the Gettysburg Battle-field Memorial Association vs. Sherfy (9 Cent. Rep., 156).

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Court of Common Pleas of Montgomery County.

BOROUGH OF JENKINTOWN VS. BAPTIST CHURCH OF JENKINTOWN.

A church property, in actual use for church purposes, is exempt, under the act of May 14, 1874, P. L. 158, from a municipal assessment for benefits arising from the opening of a street, such benefit being assessed upon the church property. Such an assessment is taxation.

CASE stated.

Charles Hunsicker, Esq., for plaintiff.

N. H. Larzelere and *M. M. Gibson, Esqs.*, for defendant.

The facts sufficiently appear from the opinion of the court delivered March 5, 1888, by SWARTZ, P. J.

The corporate authorities of the borough of Jenkintown laid out Beechwood avenue. A jury was appointed under the act of April 22, 1856, P. L. 525, to determine the damages and make assessments for contribution upon all such properties as were benefited by the opening of the said avenue. The jury assessed the Jenkintown Baptist Church for contribution, fixing the amount at $352. The church claims exemption from such contribution. Is such assessment a tax or taxation within the meaning and spirit of the act of May 14, 1874, P. L. 158?

A church property is exempt from the assessment for the construction of a sewer: City of Erie vs. Universalist Church, 14 W. N. C., 232.

A cemetery company is likewise exempt from such assessment: Olive Cemetery Co. vs. Phila., 12 Norris, 129.

These properties were relieved upon the ground that municipal assessments for the costs of local improvement upon properties benefited are a species of taxation: Hammett vs. Phila., 15 P. F. S., 146.

The reasoning adopted in declaring that a sewer contribution is a species of taxation applies with equal force to an assessment for benefits conferred from the opening of a street in a borough. In McMaster vs. Commonwealth, 3 Watts, 292, the plaintiff's lot was assessed for benefits conferred by the opening of an adjoining street. And Agnew, J., held in Washington Avenue, 19 P. F. S., 360, that such an assessment was taxation. The court say: "The exercise

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of this power of assessments for benefits is not by way of eminent domain in the usual sense of this term, for it is not a taking at all followed by compensation for the taking, but it is a special mode of taxation. It is simply a new development of that principle of local taxation which assesses on the property benefited or its owner a tax in proportion to the superadded value of the property caused by the local improvement of which this property has a peculiar advantage beyond that of others not in like circumstances."

The assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by the opening, widening or vacating of streets, has long been recognized in this state and elsewhere as a species of taxation: In re Vacation of Centre Street, 19 W. N. C., 89.

The court in demonstrating that a sewer contribution is a tax proves conclusively that an assessment for benefits conferred in opening a street is likewise a tax or species of taxation. In each case we have an assessment deriving its validity from the legislative power to tax. Whenever the two methods of assessment are spoken of they are classed under the same head. In each case the contribution is demanded for benefits conferred.

Contribution according to benefits conferred by street openings is just and equal, which may not always be said of an assessment for sewer construction where the cost is paid according to the street frontage of the respective owners. This element of equality recommends the method of assessment as authorized special taxation.

If then we are correct in holding that this assessment for benefits conferred is a species of taxation, it follows that the defendant is exempted from paying the contribution, for the act of May 14, 1874, relieved churches from every variety of city and borough tax: Erie vs. Universalist Church, *supra.*

It may seem unjust that property should not pay for actual benefits conferred, but the same objection may be made against every other tax exemption. The borough may expend large sums of money in improving a street upon which a church edifice fronts, the property may become more valuable by reason of the improved street, and yet the borough can not collect one dollar as a municipal tax from the church authorities.

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To be relieved from taxation for benefits conferred by opening a street is no higher privilege than the relief from taxation to keep the street in repair.

In a similar case the Common Pleas of Philadelphia decided that such assessments were taxation and could not be collected from charitable institutions: In re 51st Phila., 44 Leg. Int., 196.

And now, March 5, 1888, judgment is entered in favor of the defendant with costs upon the case stated.

Supreme Court of Pennsylvania.

Appeal of Joseph T. Williams, Guardian.

A guardian who agreed to permit the father of his wards to invest the trust funds and charge no commissions therefor, is not for that reason precluded from receiving a reasonable compensation for other work done.

Appeal from the decree of the Orphans' Court of Montgomery county.

The facts of the case fully appear from the opinion of the Supreme Court.

J. P. Hale Jenkins, Esq., for appellant.

Henry C. Boyer, Esq., for appellee.

The opinion of the Supreme Court was delivered March 5, 1888, by Mr. Justice Williams.

This case involves but a single question. The appellant was duly appointed guardian of the minor children of Charles Williams by the Orphans' Court of Montgomery county on the 15th of June, 1863. His wards were legatees under the will of their grandfather, Joseph Williams, and entitled as such to sums amounting in the aggregate to over $70,000. Their father, Charles Williams, was one of the executors of the will of Joseph. As father of the legatees and executor of the will, under the provisions of which the legacies were to be paid, he was under the law and the rules of the Orphans' Court ineligible to appointment as guardian. He accordingly secured the

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appointment of his nephew, Joseph T. Williams, the appellant. But it was his purpose not to surrender the custody and management of the fund, or allow the guardian to discharge the duties which his appointment devolved on him, beyond what was absolutely necessary. He accordingly obtained from appellant in April following his appointment the contract upon which the wards now deny to their guardian a single farthing compensation, and on the construction of which this case depends. The contract is as follows:

"This is to certify and declare that Charles Williams has assumed and will assume the collection and receipt of all moneys that have accrued or which may accrue to his children under and by virtue of the last will and testament of their grandfather, Joseph Williams, deceased, and the investment of the same; also the collection of the interest thereon; and that Joseph T. Williams, guardian of said children, has deposited in his hands the securities in which the moneys of his said wards have been invested; and Charles is to keep him, the said guardian, clear of all liability or responsibility in relation to the trust funds belonging to the said children; and the said Joseph has also agreed that his executors or administrators shall not charge any commissions except in the event of the decease of the said Charles and the actual performance of the trust devolves on him or his representatives, then to be allowed to charge commissions on the funds which may at the time be in their trust. It is further agreed and distinctly understood that the said representatives shall not charge, under any plea or circumstances, more than two per cent. commissions. Witness our hands and seals the 1st day of Fourth-month, 1864."

The auditor finds that in accordance with this agreement the moneys of the wards were immediately turned over by the appellant to Charles Williams, who invested them and took entire charge of them until his children severally came of full age. He also finds that the appellant performed his duty as guardian in all other respects, representing his wards in the Orphans' Court, examining the securities offered for loans, and executing such papers as required his signature. From these facts he concludes and recommends to the Orphans' Court that the appellant should be held to the terms of his agreement of April 1, 1864, and allowed no commission upon the money belonging to his wards, but that for other services he was entitled to a reasonable compensation, which he fixes at $1,050.

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This seems to be in harmony with the agreement of April 1, 1864, and with the justice of the case.

There were many duties devolving on the guardian that he could not discharge except in person. These the agreement did not touch. It simply provided that the management of the fund and the commissions to be earned thereby should be turned over to Charles Williams.

Every other duty which his appointment cast upon him he was to perform in person, and there is nothing in the agreement nor in the circumstance to prevent his charging a reasonable compensation for his services. It is conceded that he discharged his trust with fidelity, and that for twenty-three years he has in many ways rendered important services to his wards. When he asks for commission his wards reply in effect, "Because you agreed to surrender part of your compensation for our benefit, you shall have nothing." But it does not follow, as we have already said, that an agreement not to charge for services that Charles Williams undertook to perform in his stead, affords the slightest reason for refusing to the guardian compensation for services that he had to render by virtue of his appointment, and that Charles could not have relieved him from even if he had undertaken to do so.

It is very clear that the appellant was entitled to a reasonable compensation, and the auditor finds that $1,050 is reasonable.

It is not alleged that this sum is not a fair compensation, if a compensation is to be allowed, but the executors insist that under the agreement of April 1, 1864, the appellant is precluded from asking any compensation whatever.

The decree of the Orphans' Court is now reversed in so far as it denies the appellant the compensation recommended by the auditor, and record remitted for final execution in conformity with this opinion.

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CATHARINE GILLION vs. ALBERT V. FINLEY.

A lease was in these words: "This lease witnesseth that Catharine Gillion hereby lets unto Albert V. Finley the store-room and room over store and the cellar under the same for the term of one year, with the privilege of three years from first day of April, A. D. 1885, at the rent of two hundred and four dollars per year, to be paid in twelve monthly portions," etc. *Held* to be a lease from year to year not exceeding three, at the option of the lessee, who had a right to quit at expiration of second year.

ERROR to Court of Common Pleas of Montgomery county.

The matter arose in the court below upon the following case stated:

Plaintiff leased to defendant certain premises in the borough of Norristown, said county, by a written lease, of which the following is a true copy:

"This lease witnesseth that Catharine Gillion hereby lets unto "Albert V. Finley the store-room and room over store and the cel- "lar under the same for the term of one year, with the privilege of "three years from first day of April, A. D. 1885, at the rent of two "hundred and four dollars per year, to be paid in twelve monthly "portions, etc.

"Witness the hands and seals of the said parties the 13th day "of March, 1885.

[Signed] "CATHARINE GILLION. [Seal.]
"ALBERT V. FINLEY." [Seal.]

Defendant remained in possession of said premises from April 1, 1885, to April 1, 1887, and has regularly paid his rent to that time. Three months before the expiration of the second year of said tenancy he gave notice of his intention to remove from the premises on April 1, 1887. Plaintiff has brought suit to recover rent for the months of April and May, 1887.

If the court shall be of opinion that defendant is liable therefor, judgment is to be entered in favor of plaintiff for thirty-four dollars, otherwise judgment to be entered for defendant. Costs are to follow the judgment, either party reserving the right of suing out a writ of error to the Supreme Court.

The opinion of the court below was delivered January 16, 1888, by SWARTZ, P. J.

The lease was to continue "for the term of one year, with the privilege of three years from the first day of April, 1885, at the rent of two hundred and four dollars per year."

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We interpret this language to mean that the lease could remain one year or from year to year not exceeding three years. A privilege to remain three years must include the privilege to remain two years. The whole necessarily includes the parts. We must construe the lease in favor of the tenant rather than in favor of the lessor. In the absence of anything to the contrary, the tenant by giving due notice, such as was given, had the right to terminate the lease at the end of the second year; he exercised the option secured to him under the lease. The lease fixed the rent at two hundred and four dollars per year, indicating a term from year to year rather than a term of three years. The landlord can not complain, for he received due notice of the intention to quit. It is argued that this interpretation destroys the mutuality of the contract, but we must remember that the contract starts out with granting a *privilege* in favor of the tenant.

And now, January 16, 1888, judgment is entered for the defendant with costs upon the case stated.

Charles Hunsicker, Esq., for plaintiff in error.

William F. Solly, Esq., for defendant in error.

The opinion of the Supreme Court was delivered March 19, 1888.

PER CURIAM.—Judgment affirmed on the opinion of the court below.

LOWER PROVIDENCE LIVE STOCK INSURANCE ASSOCIATION VS. JAMES R. WEIKEL.

The refusal of the court below to enter a non-suit is not assignable for error.

It is necessary for the correction in the Supreme Court of an error by the court below in entering judgment on a reserved point, that an exception should be taken at the time of entering the judgment.

ERROR to Court of Common Pleas of Montgomery county.

The facts of the case, as well as the charge of the court below by SWARTZ, P. J., will be found in full in Weikel vs. Insurance Co., 3 MONTGOMERY COUNTY LAW REPORTER, 207, 211.

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The assignments of error were as follows:

1. The court erred in overruling the motion of the defendant below for a non-suit.

2. The court erred in not entering judgment in favor of the defendant below on the point reserved *non obstante veredicto.*

3. The court erred in ruling that no notice by the plaintiff below to the defendant association, its President or Vice President, of the death and loss of the mare insured was required under the charter and by-laws of the association, and that notice of the injury alone was sufficient; and in directing judgment to be entered in favor of the plaintiff on the question reserved.

J. A. Strassburger and *Theo. W. Bean, Esqs.*, for plaintiff in error.

F. G. Hobson, Esq., for defendant in error.

A refusal to non-suit is not assignable for error:

Girard vs. Gettig, 2 Binn., 234.

Ballentine vs. White, 27 P. F. S., 20.

As no exception was taken to the action of the court on the reserved point, the second and third assignments are not good:

Act of March 28, 1835, P. L. 90.

Merkel vs. Berks Co., 32 P. F. S., 505.

Bank vs. Eyer, 10 Id., 436.

The opinion of the Supreme Court was delivered March 19, 1888.

PER CURIAM.—There being no exception to the judgment on the reserved point in this case, the assignments of error can not be sustained. Judgment affirmed.

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JOHANNA O'BRIEN, EXECUTRIX, VS. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY.

The provisions of Article XVI, Section 8, of the Constitution, securing a right to recover damages for consequential injuries to property by the construction of a railroad, make the injury complete as soon as the work is actually undertaken at the point where such injury is done, according to the plans and purposes of the company as defined by their location, grade, and general scheme of construction. If the damages are neither paid nor secured in advance, an action to recover the amount thereof may be maintained immediately after the work is undertaken; and in such action the plaintiff may recover all damages which may be caused by the location and by the subsequent construction of the road.

A railroad company having located its line through a contemplated excavation in a certain borough began work in accordance with the plans. The road caused consequential injury to neighboring real estate; the owner thereof was alive when the work was begun. Said owner afterwards died before the work was completed. An action being brought by his executrix subsequent to the completion of the work to recover damages for the injury to the real estate: *Held*, that the right of action accrued during testator's lifetime as soon as the work was begun, and that therefore the action could be maintained by his executrix.

ERROR to the Common Pleas of Montgomery county.

The facts of the case fully appear from the opinion of the Supreme Court.

Charles Hunsicker and *Henry M. Tracy, Esqs.*, for plaintiff in error.

Charles H. Stinson, Esq., for defendant in error.

The opinion of the Supreme Court was delivered March 12, 1888, by MR. JUSTICE CLARK.

This action on the case was brought by Johanna O'Brien, executrix of the last will and testament of Jeremiah O'Brien, deceased, to recover damages for an alleged consequential injury to certain real property of said Jeremiah O'Brien, in Conshohocken, arising out of the location and construction of the Pennsylvania Schuylkill Valley railroad. The railroad, which was located upon the company's own ground, runs through Conshohocken in a northwesterly direction, parallel with but north of Marble street, crossing at right angles Maple, Oak, Forrest and Fayette streets. O'Brien's property consisted of a lot on the corner of Marble and Forrest, and other lots adjoining on the south; also another lot on Oak street, some distance south of Marble. Thus, it will be observed, the railroad was north and O'Brien's properties were all south of Marble street.

The grade of the railroad required an excavation of some thirteen or fourteen feet to be made at the several street crossings. When the work was commenced a temporary bridge was thrown over Oak

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street until the entire excavation was complete, when a permanent bridge was built over Forrest; then the temporary structure over Oak was removed, the street fenced across, and it so remained. The bridge over Forrest is elevated several feet above the grade line of the street, and the approach is so steep and difficult as to greatly impede and obstruct travel over it. The plaintiff in her declaration complains in substance that, by reason of the premises, the streets and highways mentioned are obstructed, reasonable access to the plaintiff's property prevented, the property rendered inconvenient for use as a habitation, and the value thereof greatly depreciated; and although no part of his property has been taken, yet she alleges that, in consequence of the construction of the road, it has been injured and in great measure destroyed.

Jeremiah O'Brien died on the 17th of November, 1883, and it seems to be conceded that the railroad had been located and the excavation of these streets commenced before that date; but the work was not completed until about the 1st of April, 1884. The court instructed the jury if they should find that the excavation was made and the bridge built after the death of O'Brien, the plaintiff could not maintain her suit as executrix. "I instruct you," says the learned Judge, "that the person who was the owner of the property at the time the railroad company constructed its railway over Oak street and over Forrest street, is the party who is entitled to recover the damages; and by that I mean the party who owned the property at the completion of that part of the railway that caused the injury, whereof complaint is now made. * * * It will be important for you to determine, under this ruling of the court, who was the owner of the property at the time the railroad was completed at Oak street and at Forrest street in such manner as to occasion the damages for which the complaint is brought. * * * If you find that the obstruction or excavation in Oak street, which caused injury to these properties, was not completed on the 17th day of November, 1883, then the plaintiff can not recover any damages for the obstruction of Oak street in this case."

This instruction of the court is the only error assigned. No other question affecting the plaintiff's right to recover is raised on this record. The right of action is based on the eighth section of the sixteenth article of the new Constitution, which provides that "Municipal and other corporations, and individuals invested with

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the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation *shall be paid or secured before such taking, injury or destruction.*" The provision for an actual taking, it will be observed, is precisely the same as for a consequential injury to property; the section applies equally and alike in both cases. If O'Brien's property has been injured within the meaning of this section of the Constitution, it is plain that the compensation was payable before the injury was done, and the right of action certainly accrued at the time the compensation was to be made. The provisions of the Constitution are, in this respect, analogous to those of the general railroad law of February 19, 1849, which provides "that *before* such company shall enter upon or take possession of any such lands or material, they shall make ample compensation to the owner or owners thereof, or tender adequate security therefor."

It has been repeatedly held, construing this act of 1849, that when the railroad has been located the land has been taken and appropriated for public use; that the right of the land owner to sue for his damages is complete, and he may recover all which may be caused by the location and by the subsequent construction; that he can have but one action, and that the damages can not be severed: Wadhams vs. Lackawanna, &c., R. R. Co., 42 Penna., 310; Beale vs. Penna. R. R. Co., 86 Id., 509. The constitutional provision must, we think, receive a similar construction. If the damages must be paid or secured *before* the injury, it follows that as soon as the work is actually undertaken at the point where the injury is done, according to the plans and purposes of the company as defined by their location, grade, and general scheme of construction, the injury is complete; and, if the damages are neither paid nor secured, an action may be maintained for the damages consequent upon the completion of the road in accordance therewith.

The action is not for an ordinary trespass; no actual trespass was committed. The injury, if any, is purely consequential. It is an injury arising from the proposed construction and completion of the road, which has been already undertaken; it is a single injury entire and indivisible, and the damages can not be severed. There can, therefore, be but one action; and that action, as we have said,

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may be brought as soon as the work which results in the injury complained of is undertaken.

It is not in conformity with either the letter or the spirit of the Constitution to hold that the right of action shall be postponed until the injury is complete, for the provision is plain that "the compensation shall be paid or secured before the taking, injury or destruction." Moreover, if the right of action be thus postponed, it would be in the power of the company, by a tardy performance, to delay the action indefinitely.

The action is for consequential damages on the principles of the common law, but the right of action in advance of the injury is conferred by the provisions of the Constitution; and in this respect the present case differs from the Schuylkill Navigation Co. vs. Thoburn, 7 S. & R., 410. The case of Buckwalter vs. Black Rock Bridge Co., 38 Penna., 281, is more in accord with the facts and principles of this case. In that case the charter of the bridge company provided, in a certain contingency, for the payment of consequential damages to the owner of a ferry over the stream upon which the bridge was to be built. It provided for the assessment of all damages which the owner of the ferry "shall sustain by reason of the erection of the said bridge"; which damages, it was provided, should "be paid by the said company before the erection of the said bridge." The damages were assessed before the work began, but were estimated according to the injury which the ferryman would sustain when the work was complete.

Whether Jeremiah O'Brien by the construction of this railroad suffered any injury peculiar to himself, and different in kind and degree from that which is sustained by the general public, is a question not raised by the assignments of error. That question, therefore, is not before us. All that we do decide is, that if the injury is such as was contemplated by the Constitution, the right of action accrued when this particular part of the work was actually undertaken.

The judgment is therefore reversed, and a *venire facias de novo* awarded.

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Court of Common Pleas of Montgomery County.

HENRY A. COLE VS. COUNTY OF MONTGOMERY.

Treasurer's fees for collection of taxes in Montgomery county.

The act of March 17, 1868, P. L. 342, having specified an amount to be paid by the county to the Treasurer for collecting the state and county taxes, he is not entitled to the five per cent. allowance from the state.

CASE stated.

E. L. Hallman and *Henry D. Saylor, Esqs.*, for plaintiff.

James B. Holland, Esq, for defendant.

The facts appear from the opinion of the court delivered March 5, 1888, by WEAND, J.

In its settlement with the state for state taxes due August 1, 1886, the county of Montgomery was allowed $2,562.51, being five per cent. for collection. The County Treasurer was also allowed one per cent. as Treasurer's commissions, amounting to $486.87. The Treasurer claims that he is entitled to the five per cent. allowance in addition to the one per cent. conceded to be due him, and which he has received.

By the act of March 23, 1865, P. L. 635, the County Treasurer of Montgomery county was to receive in full compensation for his services on behalf of the county, on all moneys of the county received and paid by him, a sum not exceeding three thousand dollars per annum.

Under existing legislation he was also to receive from the state for receiving and paying over state funds one per centum upon the amount paid by him. This is still the law so far as he has any direct claim against the state. Since then his duties as custodian of state funds have somewhat changed. Certain taxes which formerly passed through his hands have been repealed and others are collected by different officers; new taxes have been imposed, which pass through his hands or are collected by him; but by no act of the Legislature which has been called to our attention has his compensation for the care and custody of the state's money been increased.

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Prior to the passage of the act of March 17, 1868, P. L. 342, the state and county taxes assessed in Montgomery county were collected by collectors appointed by the Commissioners of the county, and who received as compensation five per cent. upon the amount paid in. The amount thus paid on account of state taxes was allowed to the county as a credit on the settlement of its account with the state authorities.

By the act of 1868, *supra*, the whole system of collecting state and county taxes in Montgomery county was changed, and it became the duty of the Treasurer to attend at least one day in each election district in said county for the purpose of receiving the state and county taxes; and in case any of said taxes were not paid after the first day of October in any year it became his duty to issue his warrant for the collection of the same to the constable of the proper township, ward or borough, who were to collect the amounts with five per centum added thereto for their compensation in collecting the same. Section 12 of the act provides that "in addition to the salary now by law paid to the treasurer of said county, he shall be allowed the further sum of fifteen hundred dollars out of the funds of said county."

It is admitted that by no express legislation is the County Treasurer entitled to this allowance from the state, but it is claimed that as he has new and increased duties to perform for the state he should be allowed the amount which now goes to the county. We can not see, however, how he can claim any compensation from the county. His pay for collecting county moneys is definitely fixed by law, as are also his commissions from the state. For the new duties imposed upon him by the act of 1868 he was allowed by the act a sum which the Legislature thought a sufficient compensation for collecting both the state and county taxes. No contract, either expressed or implied, is therefore shown between the Treasurer and the state or the county. The allowance of five per cent. in the settlement of the State Treasurer is in favor of the county, and we can not see how the County Treasurer is entitled to any part of the amount. Even conceding that the additional duties imposed by the act of 1868 were performed partly for the state, and that therefore the state ought to pay part of the commissions in that behalf, yet as the county does not complain that she is obliged to pay the whole amount, and as nowhere does it appear that the Treasurer is enti-

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tled to receive any compensation from the state in excess of the one per cent., we can not concede his claim.

And now, March 5, 1888, judgment is entered for the defendant on the case stated, with costs of suit.

Roscoe K. Moir vs. George S. Emerick.

Where one partner contributes money as capital against the skill and labor of his associate, and the money so contributed is lost in the business, each partner must bear an equal share of such loss where the articles of copartnership provide that the partners "shall each receive one-half of the profits and sustain one-half of the losses of the said business"; but in the absence of any stipulation as to losses the partner contributing the capital must bear all the loss.

Case stated.

David Ross, Esq, for plaintiff.

H. C. Boyer, Esq., for defendant.

The facts fully appear from the opinion of the court delivered March 5, 1888, by Swartz, P. J.

The plaintiff and defendant entered into articles of copartnership wherein it was stipulated as follows: "It is hereby agreed that the capital of the said partnership shall be the sum of five thousand dollars, to be contributed by the said Roscoe K. Moir, against which the said George S. Emerick shall apply his skill, judgment, time and attention, and prosecute and conduct the business of the said firm, except the financial management and direction of the same.

"The said Roscoe K. Moir and the said George S. Emerick shall each receive one-half of the profits and sustain one-half of the losses of the said business; but the said George S. Emerick, in consideration of his time and managing and conducting the said business, is to draw the sum of one thousand dollars per year during the continuance of this copartnership, payable in monthly installments of eighty-three and thirty-three-one-hundredths dollars, which is to be considered a portion of his profits, and is to be deducted from his share of the profits; and the balance, if any, is to be placed to his credit upon the books of the said firm at the yearly settlement be-

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tween the said partners, and so on at the end of each year of the term of this copartnership until the amount so placed to his credit equals the amount of cash capital contributed by the said Roscoe K. Moir."

Moir furnished the five thousand dollars capital. The copartnership was to continue for five years; but at the end of one year and nine months all the capital was lost, and the partnership was dissolved by proceedings in equity.

Emerick drew from the firm during the continuance of the partnership the monthly allowance mentioned in the articles. No profits were made. Moir now claims that Emerick should pay over to him the sum of twenty-five hundred dollars, being a moiety of the capital contributed and lost. Moir makes no claim upon Emerick on account of the moneys drawn out by Emerick.

The five thousand dollars were contributed by Moir as the capital of the partnership. To it was to be added the "skill, judgment, time and attention" of the other partner. The monthly compensation drawn by Emerick was not an expenditure of the firm, for it was chargeable against Emerick's share of the profits. If the contemplated profits had been realized, this monthly draft by Emerick could not have diminished Moir's net gains. The contributions of the partners were money by the one against the skill and labor of his associate.

The articles contemplated that Emerick in time should also furnish five thousand dollars as capital. This would seem to be an unfair provision; but as the partners made the agreement it is their contract and not within our province to find fault with it. The contingency, however, did not arise, and we only mention this stipulation as an indication that Emerick was not to enjoy any advantage over his associate, but on the contrary agreed to assume more than his due share of the responsibilities of the business.

Where one partner contributes money against the skill and labor of his associate, and no provision is made for a division of the losses, the partner contributing only labor and skill is not required to make up any part of the capital lost in the business: Early vs. Durburrow, 8 Phila., 93.—[Opinion by Sharswood, J., Common Pleas, Philadelphia.] In some states a different rule prevails, and partners under such articles share the loss of capital in the same proportion as the profits are divided.

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In the case before us the partners agreed upon the division of losses. The articles provide "shall each receive one-half of the profits and sustain one-half of the losses of the business." They are to share equally the losses in the business. The five thousand dollars capital was invested in the business, debts were contracted, and to pay these the plant, machinery, book accounts, and all other assets were swept away. They lost five thousand dollars in the business; this was a money loss. The defendant claims he is only to share in the losses resulting from bad debts and like misfortunes. These are the very losses he is called upon for contribution; if he pays his share of the losses from bad debts, losses on sales, losses on goods manufactured, and losses from kindred misfortunes, the capital will not be impaired. If each partner pays over one-half of these business losses, the capital will remain intact.

We must interpret the contract so as to give effect to every provision in it, if possible. There is no loss in said business so long as the profits exceed the losses from bad debts, other misfortunes or mistakes; there is still a net gain. If Emerick can not be called upon to contribute for losses, except such as do not affect the capital, then the provision in the articles for a division of the losses is surplusage. The stipulation as to the profits would cover the meaning of the parties.

The case of Yohe vs. Barnet, 3 W. & S., 81, determines this contest against the defendant. Yohe, Barnet and Sitgraves entered into copartnership. Barnet and Sitgraves each furnished three thousand dollars as capital. Yohe contributed his skill and labor, the profits and losses to be equally divided among the three partners share and share alike. Barnet lost part of his capital in the business, and brought suit against Yohe for contribution, claiming of him one-third of the loss. The jury was instructed to find against the claimant. Kennedy, J., after passing upon other questions that arose in the case, said: "Indeed I am far from being satisfied that the written memorandum does not go to show that it was the intention of the parties that in case of loss each should contribute his proportion, say one-third thereof, in money, for the words of it are, 'the *profits* and *losses* to be *divided equally* between the *three copartners share* and *share alike*.' Now it must be observed here that the profits and losses are coupled together and to be shared in like manner. That the profits, if they consisted of money, were to be

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divided and shared in money equally between the three, will not, I think, be denied; and why shall not the losses, if they consist of money, be divided and shared equally also in like manner—that is, in money between the three?" This reasoning applies with equal force to the articles of copartnership in our case.

Why should Emerick escape from all responsibility? Under his interpretation of the contract he had nothing to lose in the venture but all to gain. He was paid for his "time and attention," and his "skill and judgment" he still possesses, while Moir lost all. As we read the articles, Emerick was to contribute and make good half the losses; the firm lost five thousand dollars in money, of which Emerick must contribute twenty-five hundred dollars.

And now, March 5, 1888, judgment is entered in favor of the plaintiff and against the defendant for the sum of twenty-five hundred dollars, with costs upon the case stated.

Supreme Court of Pennsylvania.

Appeal of George W. Rogers and H. B. Dickinson, Committee of Charles Streeper, a Lunatic.

The court having jurisdiction of the accounts of the committee of a lunatic has not power to decree the payment by the said committee of claims for professional services which were not rendered in the proceeding *de lunatico inquirendo*.

A. was arrested, and in prison. A proceeding *de lunatico inquirendo* was begun. Before the report of the inquisition A.'s counsel procured a writ of habeas corpus and employed physicians to examine into A.'s condition. The physicians made the examination and prepared a report, which was submitted to the court on the hearing of the habeas corpus. A. was subsequently found a lunatic and a committee appointed. The physicians having applied for a rule upon A.'s committee for payment for their services, and the committee having denied their liability: *Held*, that the services not having been rendered in the proceedings *de lunatico inquirendo*, the court had no jurisdiction to grant the rule; that the claimants' proper remedy was by an action at law with notice to the committee of the lunatic.

Appeal from the decree of the Common Pleas of Montgomery county.

The facts of the case fully appear from the opinion of the Supreme Court.

D. Ogden Rogers, Esq., for appellants.

Henry C. Boyer, Esq., for appellee.

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Appeal of Rogers et al.

The opinion of the Supreme Court was delivered March 12, 1888, by MR. JUSTICE CLARK.

In Wier vs. Myers, 34 Penna., 377, it was held that the committee of a lunatic ought not to be subject to action for any of the expenses of the process by which the lunatic and his estate are put into the custody of the law. "All these expenses," says this court, in that case, "ought to be carefully supervised by the court; and, considering the helpless condition of the lunatic, none ought to be allowed except such as are manifestly just and moderate. If the committee is liable to action, he may be sued anywhere, and thus put to very unjust inconvenience and expense under the forms of law. The court that has the final settlement of the committee's account ought to have the control of the committee's expenditure." But the services of Drs. Biddle and Mills were not rendered in the proceeding *de lunatico inquirendo.* Streeper had been arrested and was in prison for crime; in order to be relieved from imprisonment he sued out a writ of habeas corpus, and it was in connection with this the alleged services were rendered. It may be said that the criminal act, the arrest, and the issuing of the habeas corpus, led up to the proceedings in lunacy, and that Biddle and Mills became witnesses in the lunacy case because of the professional knowledge of the case they had acquired in their previous examination; still, the fact remains that the services were not rendered in the lunacy case. Their charges can not be considered as part of the expenses thereof; as well might we embrace the costs of the criminal proceeding and of the habeas corpus and the attorney's charges in both.

The doctors' charges stand upon the footing of an ordinary debt or demand on the lunatic's estate. If their services were reasonably proper and necessary under the circumstances, and were rendered in good faith, at the instance of the attorney issuing the habeas corpus, the lunatic would be liable therefor, as for any other necessary and valuable thing done or furnished him. If the liability of the lunatic's estate had been conceded by his committee, and the price or value of the services had been agreed upon, or otherwise lawfully ascertained, the court might have required the committee to raise the necessary funds to discharge the debt. But the demand was disputed by the committee, who alleged that the services, if they were rendered at all, were wholly unauthorized, and that the estate of the lunatic was in no way liable therefor. Under such circum-

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stances the court could not assume to settle the dispute or to order the payment of a debt which the committee denied. It was the undoubted right not only of the creditor but of the lunatic debtor, through his committee, to have the validity of the claim and its amount ascertained by due course of law; and a suit brought with notice to the committee, and prosecuted to judgment, *bona fide*, would be conclusive as to the amount and merits of the plaintiffs' demand. The judgment thus obtained would, of course, give the creditor no preference by way of lien, nor would it enable him to enforce payment in the ordinary form of execution. The validity of his claim being thus established, and the true amount thereof ascertained, he was entitled to lay it before the court and ask that its payment should be provided for. The debts of a lunatic are to be paid according to their character at the time of the finding of the inquisition; no preference can be acquired after the property passes *in custodia legis*.

The order and decree of the Common Pleas, made May 16, 1887, requiring the committee to pay to Dr. A. W. Biddle the sum of sixty dollars for professional services rendered by Drs. Biddle and Mills, is therefore reversed; and it is ordered that the appellee, A. W. Biddle, pay the costs of this appeal.

TELFORD AND FRANCONIA TURNPIKE COMPANY VS. JACOBS.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of the case fully appear from the opinion of the court below reported in Jacobs vs. Turnpike Co., 2 MONTGOMERY COUNTY LAW REPORTER, 101.

Irving P. Wanger, Esq., for plaintiff in error.

Charles Hunsicker, Esq., for defendant in error.

The opinion of the Supreme Court was delivered March 19, 1888.

PER CURIAM:—This case is affirmed on the opinion of the court below.

Judgment affirmed.

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INCORPORATION OF PENNSBURG.

When an application for the incorporation of a borough is laid before the grand jury, their certificate need not be annexed to the application, although the certificate speaks of such annexation.

CERTIORARI to the Court of Quarter Sessions of Montgomery county.

The facts of the case, as well as the opinion of the court below by SWARTZ, P. J., will be found in In re Incorporation of Pennsburg, 3 MONTGOMERY COUNTY LAW REPORTER, 187.

Charles Hunsicker, Esq., for appellant.

Wm. F. Dannehower, Esq, for appellee.

The opinion of the Supreme Court was delivered March 19, 1888.

PER CURIAM.—As the annexing of the certificate of the grand jury to the petition was a merely mechanical duty, the court properly ordered its clerk to perform that act.

Order affirmed.

BARKDOLL VS. PENNSYLVANIA RAILROAD COMPANY.

An employe knowing a car is unsafe to handle in the ordinary manner, should refuse to put himself in the dangerous position; but having done so he assumed the responsibility, and the consequences of the accident can not be charged to the employer.

ERROR to the Common Pleas of Montgomery county.

The widow of Barkdoll brought suit against defendant to recover damages for the death of her husband, caused by the alleged negligence of defendant in operating a broken car. Barkdoll was a brakeman, and was crushed to death while coupling two cars. One of the cars was broken and in such a way that it could not be coupled to another car in the ordinary manner without great danger to the person attempting it. The car had been lately broken, and the words "For the shop" were written on it in chalk. The assistant road master called Barkdoll's attention to the car and warned him to be careful in handling it. The conductor of the train also warned him. Another brakeman testified that when he saw Barkdoll enter between the cars to couple them he refused to give the signal for backing, and that Barkdoll gave the signal himself, and then entered

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between them and was caught and killed. The court charged that it was the duty of every employe who had anything to do with the car to exercise more than ordinary caution. Verdict and judgment for defendant.

H. U. Brunner and *Geo. N. Corson, Esqs.*, for plaintiff.

Chas. H. Stinson, Esq., for defendant.

The opinion of the Supreme Court was delivered March 19, 1888.

PER CURIAM.—The principle of law that the employer is bound to furnish his employes with safe appliances and machinery with which to do their work, is undoubted. But it is just as certain that when the employe discovers that the machinery about which he is employed is dangerous, and still continues to use it, he takes upon himself the risk of any accident which may result from its use. Now, Barkdoll being a brakeman certainly knew that the broken car was unsafe to couple in the ordinary manner; hence it was his business to refuse to put himself in a dangerous position, but having done so he assumed the responsibility, and the court below properly refused to allow the consequences of the accident to be charged to the company.

Judgment affirmed.

Orphans' Court of Montgomery County.

APPLICATION FOR APPOINTMENT OF A GUARDIAN FOR LIZZIE STEVENS, A MINOR.

That a father is in indigent condition is no reason for depriving him of the care and society of his children if he is a suitable person to have their custody. The court will not interfere with him in his efforts to secure the society, affection and care of his child, unless it is clearly shown that by his conduct he has forfeited the rights of a father.

B. E. Chain, Esq., for application.

Charles Hunsicker, Esq., for father of the minor, contra.

The facts of the case fully appear from the opinion of the court, delivered April 16, 1888, by SWARTZ, P. J.

Lizzie Stevens is a minor nearly fourteen years old. Her mother died four years ago. The minor during these four years lived

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in the family of her aunt, Mrs. Comly. The father sent her to private schools during two years and paid for her education. She spent some time in the family where her father boarded. He visited her from time to time at Mr. Comly's during the first two years, and contributed some seventy or eighty dollars towards her support. He contributed nothing for the last two years, and his visits to the child ceased one year ago. The minor is a legatee under the will of her maternal grandfather, and the guardian of her estate collected the legacy, amounting to three thousand dollars.

Mrs. Comly petitioned the court on behalf of the minor for the appointment of a guardian of the person, and in support of her application alleges that the father is not a proper person to be entrusted with the control or custody of his child. Lizzie has a comfortable home with her aunt and is well cared for, and thus far Mr. Comly makes no demand upon the guardian or father of the child for compensation.

The child evinces a strong desire to remain with her aunt, and exhibited in court an intense hatred against her father. She seems to have lost all affection for him, and without cause or excuse manifests a disposition toward him that is unnatural. That she was loving and affectionate to her father but two years ago is clearly shown, and that he was kind and affectionate while the child lived with him is also proven. What has he done whereby he forfeits the rights that a father should have over his own child? The act of May 4, 1885, P. L. 430, provides that a guardian of the person may be appointed when the father "from drunkenness, profligacy or other cause neglects or refuses to provide for his child." There is no allegation of drunkenness in this case. The father is without means and not engaged in any steady employment. "That a father is in indigent condition is no reason for depriving him of the care and society of his children, if he is a suitable person to have their custody." Heineman's Appeal, 96 Penna., 114.

When the father had funds he paid for the child's education and contributed to her maintenance. No demand was made upon him for the child's support. We can not say that he neglected or refused to provide for her, when there is no proof that he was called upon for such support, and no proof that any was required from him for the child's comfort. The fact that the aunt provided a comfortable home and surrounded the child with everything that was neces-

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sary to make her happy and comfortable, does not prove that the father refused to provide for the child. It seems that the father was unsuccessful in business, and is inclined to drop one employment and seek another. He has shown, however, that he is a man of good character and sober habits; and it will not do to say that a father shall lose control over his children because he is unfitted to become a successful business man.

He failed to visit the child for the last year, and this indicates neglect and want of affection for her. We must remember, however, that he was forbidden the house by Mrs. Comly, and this may in part excuse the failure to see his child; especially so when the child refused to see him or talk to him when he did call. Lizzie is his daughter, and the court should not interfere with a father in his efforts to secure the society, affection and care of his child, unless it is clearly shown that he forfeited the rights which the law provides every father may exercise over his child. We think David Stevens should have an opportunity to win back the affections of his child. He says he has a home for her, and will care and provide for her. Ellwood Stevens, a son of David, and only brother of Lizzie, gives assurance that such home is provided, and in the very house where heretofore the mother, father and two children lived happily together. The son is married, and will live in the same house with his father and sister; he is industrious and earns good wages, and his employer has full confidence in his integrity, for he is willing to obligate himself that the son and father will care and provide for the child, and this, too, without any aid from the minor's estate.

It may be that the child has a better home than the father can give her; but this might be said of any poor man's child, where the rich and influential sought to deprive him of his child. The father has rights that can not be ignored, and the daughter owes duties to her father that it is hoped she may realize and comprehend as she advances in years.

The father should be given an opportunity to provide and care for his child in his own home; if he fails to give her that care and attention that is due from a faithful father, the application can be renewed and he will then be deprived of the custody of the child.

And now, April 16, 1888, the application for the appointment of a guardian of the person of Lizzie Stevens, a minor, is dismissed.

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ESTATE OF RICHARD CONNELLY, DEC'D.

A sale by executors, under a clearly expressed power of sale for the payment of debts, discharges the land from the lien of debts not of record, although five years have not elapsed since the death of the testator.

The nineteenth section of the act of February 24, 1834, P. L. 81, does not apply to such cases, and is only applicable where by the law as it previously stood a purchaser would be bound to see to the application of the purchase money.

A petition was presented alleging that A. had purchased land from the executrix under a power of sale contained in the will, with an accompanying affidavit of no debts. The prayer was for leave to pay the money into court or to the executrix. *Held*, that the court had no jurisdiction to grant the order.

In the matter of the application of Kline Van Winkle for leave to pay purchase money of real estate into court.

Charles Hunsicker, Esq., for application.

The facts sufficiently appear from the opinion of the court delivered April 16, 1888, by WEAND, J.

This application sets forth that the petitioner has purchased from Ellen Rockman, executrix of the last will and testament of Richard Connelly, deceased, certain real estate situate in Cheltenham township; that the sale was made by virtue of the powers and authority contained in the last will and testament of said testator, dated January 31, 1887; and accompanying the petition is an affidavit of the executrix that there are no debts of the estate. The petitioner is desirous of paying the purchase money into court or to the executrix, "in conformity with the act of Assembly in such case made and provided." No reason other than above stated is given why the vendor should not receive the money directly from the purchaser, or why it should be paid into court and she be obliged to give security.

The petitioner bases his application on the nineteenth section of the act of February 24, 1834, P. L. 81, Purd. Dig. 535, pl. 136. Before the court can make an order of this kind some reason should be given to show our jurisdiction in the matter. If there is a general power of sale and no debts, there would seem to be no reason to impose unnecessary burdens upon the executrix or to invoke the action of the court for a useless purpose. The section of the act in question was passed to protect purchasers from a misapplication of the purchase money in cases where one purchasing real estate of a decedent is bound to see to the proper disposition of the proceeds of sale. But this petition discloses no facts which impose any such liability upon the petitioner. Conceding that the affidavit filed is

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not conclusive, and that there may be debts not of record, the case is no stronger, for it has been frequently held that an express power of sale in the executor, for the payment of debts, frees the land from the lien of debts not of record: Hannum vs. Spear, 1 Yeates, 380; Id., 2 Dallas, 291; Grant vs. Hook, 13 S. & R., 262; Cadbury vs. Duval, 10 Barr, 265; Konigmaker vs. Brown, 2 H., 269.

In Cadbury vs. Duval Judge Bell thus states the proposition: "The primary question is whether, under a *bona fide* execution of the power to sell, conferred by the will, etc., the vendee of the trustees, on payment of the purchase money, could assert a title, discharged of the general debts of the testator, or whether the purchaser was bound to see to the application of the price in the payment of debts." And it was decided that a sale under a testamentary power for the payment of unscheduled debts discharges the land from the statutory lien of testator's debts.

Referring to the nineteenth section of the act of 1834 the court says: "It is obvious that it was intended to confer an additional privilege on executors and purchasers, as a further guaranty of their safety. So far as it relates to the payment of debts it has application only to those cases where a simple execution of the power to sell will not relieve the purchaser from responsibility; as, for instance, where the debts are scheduled."

The subject is very fully discussed by Mr. Henry Wharton in an article entitled "Lien of Decedents' Debts," 6 W. N. C. 545. After reviewing the entire subject he thus speaks of the nineteenth section of the act of 1834: "This is sometimes supposed to mean in effect that the lien of debts is not discharged by a sale unless where the purchase money is paid into court, or, by leave of the court, to the executor; and, *vice versa*, that the mere payment into court discharges the lien in all cases, no matter what the purpose of the power." And then shows conclusively that the "section narrows itself down to the protection of purchasers under a power given to executors in cases where by the law as it previously stood a purchaser would be bound to see to the application of the purchase money; as in the case of legacies or scheduled debts or distributive shares."

It is difficult to see why there should be less virtue in a private sale by an executor in pursuance of a general expressed power, than there would be if the court afterward permits the executor to receive

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the money without security, which can be done. If the land is discharged in the latter case why not in the former, when it is apparent that the time of sale and not the reception of the money ought to fix the period when the debts are discharged; otherwise we would be met with the strange anomaly that the purchaser gets a clear title in one case and not in the other, although his bid was the same. It can not be possible that the mere option of the purchaser to apply for the intervention of the court can thus discharge the land from debts, unless we date the discharge back to the sale, from which it follows logically that the sale by virtue of the power and not the decree of the court works the discharge.

If therefore the decedent left no debts, or if he did, and the sale by the executor relieved the purchaser from any liability to see to the application of the purchase money, the court has no jurisdiction to make the order prayed for. The frequency of similar applications induces us to indicate our opinion for the information of counsel in the future, and particularly to call attention to the Price act of 1853, under which, it appears to us, relief can be found, if any is needed, in most cases where a sale by the trustee or executor will not protect the purchaser.

And now, April 16, 1888, the prayer of the petitioner is refused.

Court of Common Pleas of Adams County.

Brown, Receiver, vs. McFadden et al.

Certainty to a reasonable intent is all that is required in notices of preferred claims under the wages act of June 13, 1883.

While such notices are not required to be sworn to, it is the better practice that they be made under oath.

Application for preference and payment of wages of labor out of proceeds of Sheriff's sale of growing corn and lot of hay of Horace Heltzel.

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The following notice was served on the Sheriff:

E. S. Brown, Receiver Northwestern Mfg. and Car Co.,	Court of Common Pleas of Adams Co. Judgment.
vs.	
F. S. McFadden, Lucien Heltzel, and Horace Heltzel.	Fi. Fa. Nos. 11 and 12. Nov. T., 1887.

To S. EICHOLTZ, ESQ., Sheriff—Take notice that I claim as a preferred lien upon the goods and chattels of Horace Heltzel, one of the above defendants in execution under the above writ, the sum of $14.50 for wages due me as a farm hand and laborer in and about the business of farming in Mount Pleasant township, Adams county, Pa., carried on by said Horace Heltzel, in connection with which said goods and chattels levied on were used; that said services were rendered to said Horace Heltzel between March 7, 1887, and August 13, 1887.

You will therefore allow me the said sum of $14.50 out of the proceeds of said sale; and I demand the same as a preferred claim, said labor having been performed within six months immediately preceding this levy and sale. JOHN F. SMITH.

September 12, 1887.

Wm. McSherry, Jr., Esq., for application.

J. A. Kitzmiller, Esq., contra.

The opinion of the court was delivered January 21, 1888, by MCCLEAN, P. J.

The notice in writing in this case is abundantly sufficient. It meets all the requirements laid down in the Philadelphia case of Sanger & Wells vs. Skinner & Skinner, 16 W. N. C., 16, in showing:

1st. The process by which the goods are under execution.

2d. The amount claimed to be due as a preference.

3d. That such amount is claimed as a lien on the property under execution.

4th. The character of the labor rendered, that of a farm hand or laborer.

5th. That such labor was performed in and about a business carried on by the execution debtor, which business is within the scope of the acts, that of the business of farming in Mount Pleasant township, Adams county, Pa., carried on by said Horace Heltzel, in connection with which said goods and chattels so levied on were used.

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6th. The time when the services were rendered, not exceeding six months immediately preceding the sale.

The acts do not require the notices to be sworn to, although it is certainly the better practice, and we would advise it to be done. All that is required is certainty to a reasonable intent, and, in the claim at bar, there is no room for any uncertainty. See Livingood's Appeal, 43 Leg. Int., 365. See also Shives vs. Clouser, 4 Pa. C. C. R., 149, in which the notices were not as specific as in the case in hand, but were, under the circumstances, determined to be sufficient.

Let the claim be paid.

Court of Quarter Sessions of Montgomery County.

In re Liquor Licenses.

Construction of the liquor law of 1887.

In passing upon the necessity for a licensed house the court will consider not only the number and character of the petitioners for and against the house, but also the general surroundings and circumstances of each case, the wants of the community as shown by the number and character of the population, and the probable effect upon business interests and of society in general.

What is necessary to constitute a hotel or restaurant, and their respective requirements.

The selling of malt liquor in kettles, to be used off the premises where sold, condemned as against the spirit and meaning of the law.

Playing cards, quoits, or other games of chance for drinks, is gambling.

The facts sufficiently appear from the opinion of the court delivered April 25, 1888, by SWARTZ, P. J., and WEAND, J.

In addition to the old licenses granted without opposition, we have had under consideration four new applications for hotels, one bottling establishment, and eighteen hotels and restaurants, against which remonstrances have been filed.

Mindful of the fact that an unusual interest has been manifested in the disposition of these cases, we have given each one our careful consideration. The act of 1887, known as the Brooks High License Law, was evidently a compromise measure, and ought to be so construed as to restrain (as its title indicates) the sale of liquor within reasonable bounds, and at the same time have due regard to the

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wishes and wants of the community and the interests of those whose means are invested in hotel properties. In all applications for old houses we have been careful not to deprive the applicant of his license unless compelled to do so by the terms of the law or the circumstances of the case; on the other hand, we refuse to grant new licenses unless a clear necessity therefor is shown.

The law requires us in all cases to refuse a license "whenever in the opinion of the court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant is or applicants are not fit persons to whom such license should be granted," and for violation of the liquor laws to revoke licenses. In construing this section we adopt the language of Judge Futhey in 3 C. C. R., 304: "The length of the list of signatures is not to take away the discretion of the courts in this regard"; nor does it deprive them of "the power to investigate and determine each application upon its merits, and to grant or withhold licenses according to their opinion of the necessity therefor, as well as the fitness of the applicant. In having such due regard, however, it is not meant that the court is a mere machine, whose province, in judging of the house, is to ascertain it by the arithmetical rules of addition and subtraction."

The general surroundings and circumstances of each case, the wants of the community as shown by the number and character of the population, the probable effect upon business interests and of society in general, are all to be considered; and therefore no general rule can be laid down in advance.

It may be said, however, that no person who violates the liquor law should be licensed or relicensed; that no license should be granted to a place of amusement, as generally understood, either as a hotel or restaurant, because this is forbidden by law. We see no reasonable objection to music at places where drinks are sold; but the fact that a house is maintained regularly as a place of amusement, would, in our opinion, be a fatal objection.

Many applicants lose sight of the fact that the words "hotel, inn or tavern" have a well defined meaning. In Omit vs. Commonwealth, 9 Harris, 426, Woodward, J., says: "Our system of licensed inns and taverns is founded on the just idea that it is the duty of every community to provide for the accommodation of strangers and

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travelers who come into their midst. Individual hospitality, always ready in a civilized state to relieve the wants of the wayfarer who is poor or in distress, is incompetent to accommodate all the strangers and travelers whom business or pleasure carry abroad. Inns or places of rest and refreshment must be furnished and kept in readiness for the purpose, and to induce persons to establish such houses and to maintain the requisite arrangements and attendants a monopoly is offered them in the exclusive right to retail by small measure vinous and spirituous liquors."

Every definition of the words "hotel, inn or tavern" implies a place for the entertainment of *strangers and travelers.* It does not mean a mere boarding-house. To answer the requirements of the law, therefore, such places should be located with reference to their object: in the country, on a regularly traveled public road and not in a secluded spot difficult of access; and in boroughs, towns and villages, in such convenient places with reference to railroads or other roads and places of business as will be most convenient for those desiring to patronize them. The erection of large, convenient and attractive summer resorts may often create the very necessity contemplated by law, but this must be judged of by the circumstances of each case. A restaurant means an *eating-house*—a place where eatables can be obtained at all reasonable hours, and not a mere drinking-house. To answer its purpose it should have an eating-bar or room where persons desiring eatables can be accommodated separate from the drinking-bar.

We are satisfied from the testimony developed in these hearings that in Conshohocken none of the so called restaurants are really such, but that the petitioners have had in view solely the sale of liquors. It is evident that places which supply nothing but drink are holding their restaurant licenses under false pretences, and ought not to be tolerated, because in violation of law.

We desire to call attention to the almost universal practice of selling malt liquors in kettles, to be drank off the premises, which practice, if not clearly forbidden by law, is not within its spirit and meaning. It affords opportunities for minors and intemperate persons to obtain drink from those who would not knowingly sell to them.

The law implies that the licensee shall know to whom he furnishes the liquor and what use is to be made of it, and this can only be done by requiring it to be used upon the premises. To sell an

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adult liquor and allow him on the premises to hand it to a minor to be drunk, is clearly in violation of law; and a person who by selling it in kettles affords an opportunity for improper persons to obtain it, is morally if not legally as guilty as though he sold or gave it to them directly.

Our attention has also been called to the practice of playing cards and pitching quoits and the playing of other games for drinks. This is as clearly gambling as though the stakes were money; and a conviction for such offence would require us to revoke the license of the offender.

We deem it our duty to throw out these suggestions for the benefit of all persons interested, in view of the fact that under the law the courts have no discretion where offences against the liquor law are clearly proven.

Acting upon the principles here laid down, we will now announce our decision in each case before us.

JOHN E. TURNER.

D. O. Rogers, Esq., for applicant.

Charles Hunsicker, Esq., contra.

This house was licensed for a few years, but not for the last four or five years. The fact that the license was allowed to lapse is convincing proof that there is no necessity for the hotel. Where the public support a licensed house applicants for the continuance of the license are never wanting.

The building of the applicant is a frame structure originally used by the agricultural society for the display of its exhibits. The house is not located along any highway, but stands about one hundred and fifty yards from the turnpike, and, it seems, can not be seen by the passing traveler unless the fence along the highway is removed.

The witnesses called show no public necessity for the hotel; the neighborhood is well supplied with taverns. The applicant is about to establish a farm for breeding and training horses, and the witnesses say that a hotel in connection with this enterprise is a convenience and perhaps a necessity. "Is the license necessary for the accommodation of the public and the entertainment of strangers and travelers?" is the test recognized by the law. The act of May 13,

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1887, is a restraining act, as is clearly set forth in its title; public necessity removes the restraint. A license can not be granted as an adjunct to a man's business enterprise. The law provides for the accommodation of the public, not for the profit of the individual.

There being no public necessity shown for this hotel, the license is refused.

JOHN A. HARROLD.

Samuel Money, Jr, and *I. P. Wanger, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

Many of the witnesses called in the Conshohocken cases are of opinion that there are too many licensed houses in the borough; they fail, however, to point out the particular hotels that should be suppressed. The court can not strike at random. If we do, great injustice may be done by taking away the license of the deserving and retaining the unworthy. We must be governed by the petitions for and against the application and the testimony offered.

If the people of Conshohocken want any licenses taken away they ought to be willing to say so. They must know the wants and needs of the borough, and should give us the benefit of their knowledge. If the court is to take away licenses where no proof as to the necessity for the house or the fitness of the applicant is offered, or where such proof fails, then all the applications should be considered. By selecting certain houses and excluding others, the fitness of location can not be fairly determined, nor can we compare the accommodations and conveniences furnished by the respective houses.

Judged, then, by the proofs before us, the remonstrance against John A. Harrold must fail. The necessity for the house is established by leading citizens of the borough. He seems to keep a good house. Some of the witnesses for the remonstrants say that the hotel is necessary, and accommodates strangers and travelers in considerable number when other houses refuse them.

The applicant is a musician, and at times practices with his friends at his hotel. There is no proof that he uses his bar-room as a place of amusement to attract a drinking custom. He allowed such use for one performance; we can not say that this single occurrence shows an improper house. The bar-room is not a proper

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place to study music. He has a commodious house, and other parts of it, not open to the public, should be used if he desires to continue the practice of music.

We expressed our disapproval of the indiscriminate sale of beer by the kettle. A word to the wise is sufficient.

The license is granted.

TERRENCE O'DONNELL.

James B. Holland, Esq., for applicant.

Isaac Chism, Esq., contra.

No depositions were taken in this case. The petitioners in favor of the license far outnumber the remonstrants. The application has the endorsement of some of the best citizens of Conshohocken. The papers before us furnish the only light we have in this case, and from them the necessity for the house is fully established. Counsel for the remonstrants, when the case was called, announced that he did not wish to be heard against the application.

The license is granted.

PATRICK J. MULLEN.

Henry M. Tracy, Esq., for applicant.

Isaac Chism, Esq., contra.

The testimony in this case establishes the fitness of the applicant. His house is well located; but, judged by his own evidence, the necessity for the hotel may be questioned. If this were a new application the court might well find that the necessity was too doubtful to require a license.

The license is granted.

MARGARET SINNOTT.

James B. Holland and *Henry M. Tracy, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

Of the fifteen remonstrances filed against the respective Conshohocken applications this is, perhaps, the weakest. Forty-eight per-

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sons remonstrated, but of these twelve withdrew their names—not only withdrew their names, but now ask the court to grant the license. Five others ask that their names be withdrawn. The additional petition on behalf of the applicant is signed by one hundred and twenty, more than forty of whom are women. We can not be guided solely by the number and character of the petitioners for and against the application, but in the absence of any other proof the law makes this an important test in determining the necessity for the house.

The evidence fails to sustain the remonstrance. There is some proof that more than a year ago the law was violated by sales of beer on Sunday, but it was also shown that in Conshohocken such violations a year ago were general; and if we apply this test few if any of the houses could survive. There seems to be a marked improvement in the observance of the liquor laws in Conshohocken, and we repeat that any violation of the law since May 13, 1887, clearly shown, will work a forfeiture of the license of the offender. In our judgment, the court has no discretion; the law makes such forfeiture obligatory. In fairness to the law-abiding hotel-keepers, if for no other reason, such offenders should have their licenses revoked.

The license is granted.

JAMES J. QUIGLEY.

Henry M. Tracy and *James B. Holland, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

This restaurant is one of three located on the north side of Elm street within the distance of a single block. We fail to see any necessity for the saloon. It is a drinking place; there is no pretence to serve eatables—at least the testimony discloses none. The law does not contemplate the licensing of a restaurant as a mere tippling house. One of the witnesses for the applicant testified that he could not say whether the place is necessary except to accommodate Mr. Quigley's friends. That these restaurants are not provided with eating-bars indicates that there is no necessity for such provision. Where there is a demand the supply follows, as is shown by one of the hotels near the railroad depots.

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We also doubt the fitness of this applicant. The license was transferred to him seven months ago; prior to that time he went on "sprees" every few months, and his wife says "he drank very hard since we buried our children." He yielded to this habit once or twice since he is in the restaurant business, although the wife testifies he is doing quite well now. He has a violent temper, especially when under the influence of liquor. The wife had him arrested twice within the past year, and alleges that he struck her. A man of intemperate habits and violent temper is not a proper person to be entrusted with a restaurant license.

Under the test laid down in the former part of our opinion this application must fail, and the license is refused.

LAMAR WOODWARD.

James B. Holland and *Henry M. Tracy, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

The record of this applicant is bad, so far as it relates to the observance of the liquor laws. He violated the law and was punished. The violation occurred prior to the 13th of May, 1887, and his license was not revoked. We took into consideration the condition of the liquor trade in Conshohocken, and concluded not to revoke licenses for violation prior to the passage of the new act. Due warning was given when this applicant was sentenced that thereafter a violation of the law must be followed by the revocation of the offender's license. This applicant seems to have observed the warning. When the revocation of his license was before us we could not consider the question of necessity for his house; that had been passed upon for the current year. Now, however, the remonstrance filed clearly raises the inquiry.

The applicant fails to show any necessity for an eating-house; and, judged by the testimony, he is not even equipped for serving eatables should a demand be made upon him. The witnesses do not speak of any one eating at this restaurant, or even of seeing any food about the place. If drink is all that is required, the half dozen hotels in the vicinity can supply the demand. Under the tests laid down in the former part of our opinion this application must fail.

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The law does not contemplate licensing a restaurant as a mere tippling house.

The license is refused.

JOHN W. FORREST.

Larzelere & Gibson, Esqs., for applicant.

Isaac Chism, Esq., contra.

What has been said as to the want of necessity in the other restaurant applications applies with equal force to this case. It is not an eating-house, but a mere drinking place. The saloon is located away from any external public travel; and the surrounding neighborhood, composed mostly of workingmen who have their own homes and families, makes no demand for such eating-house.

The violations of the law at this house are numerous, mainly, however, prior to the 13th of May, 1887. The weight of the evidence establishes that the applicant sold beer to a minor last summer. He also admits that he bought a ten-gallon keg of German bitters, or schnapps, within the last year, and has little of it left. Restaurant-keepers ought to know that schnapps or German bitters are not proper drinks to be sold over their bars.

The license is refused.

JOHN ROBSON.

James B. Holland and *Larzelere & Gibson, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

Many of the witnesses called by the respective applicants in Conshohocken declare that there are too many licensed houses in the borough. As already stated, we decline to take away the license from an old house unless the testimony clearly shows that such action is proper. While the testimony against most of the hotels is weak, we are convinced that this application should not be granted. The testimony offered establishes that the place is noisy and disturbs the neighbors. The applicant, by his own admissions, finds little occasion to entertain strangers or travelers. He is not willing to swear that he entertained a single guest over night during the

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month of February last. There is another hotel a block above him and one a block below him, all on the same street. It may be said that the hotels are just as numerous on Fayette street. But the only one remonstrated against is that of Thomas Holland, and the proof against his application failed entirely; in fact, the remonstrance was abandoned.

Mr. Robson also sold to minors, if the testimony is to be believed. A young man obtained enough liquor in his house to become intoxicated, and Robson must have had full knowledge of it, for he gave him the usual remedies to sober him. That the young man was a minor can not be doubted. He was called before the court, and no hotel-keeper could be deceived by his appearance.

Where music is regularly given in the bar-room to attract a drinking custom, it shows that the ordinary necessities for a hotel do not exist. The applicant is not expected to create a necessity for his house. The law contemplates that the public, the stranger and the traveler have already created such necessity.

The petitioners against the application outnumber those for it. While this is not the only test, it is one of the facts that the court must take into consideration in passing upon the application. The witnesses also testify that quarrels and fights take place in and about the premises, and that the applicant keeps his water-closet in such a manner that it is a nuisance to the community.

The license is refused.

JOSEPH M. SELINGER.

Henry D. Saylor and *J. V. Gotwalts, Esqs.*, for applicant.

J. H. Maxwell and *Larzelere & Gibson, Esqs*, contra.

There are now in the borough of Pottstown as extended fourteen hotels, five restaurants, three wholesale liquor dealers, one brewery, three bottling establishments, and one agency for the sale of beer manufactured in Berks county. We are not surprised that the citizens should object to any further increase in the number of licensed houses.

The applicant in this case, as shown by the testimony, is a proper person to be entrusted with a license; not a word is said against his personal fitness. We can not grant new licenses, however, un-

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less the necessity for them is clearly shown. There are already in Pottstown three bottling establishments, which is one-half of the number licensed in the whole county. One of these places is but half a square from the house of the present applicant. It is alleged that these establishments do not bottle Selinger's beer. There is necessarily a competition among the bottlers; and, surely, if there is a demand for Selinger's beer one of these will see that it is bottled.

The large manufacturing interests in Pottstown ask that this license be refused because of the temptation it would offer to the six hundred or more workmen who pass the house daily in going to and from their work. The court passed upon this application last year and refused the license, and we know of no change of circumstances that calls for any different action this year. The license is refused because there is no necessity for it.

The applicant is a brewer, and his brewery is so situated that the licensing of the bottling establishment as prayed for may be deemed a violation of the United States revenue laws. It is certainly a violation of the spirit of the Revised Statutes, which say that the bottling of fermented liquor shall not be carried on upon any premises communicating with a brewery. The house we are asked to license is next to the brewery, with but a private alley between the properties—an alley that Mrs. Selinger, who owns both properties, may close at any time, and by the closing of which the one property abuts or joins the other, and both may be said to be built upon parts of the same premises.

We do not refuse the license upon this technical objection, but upon its merits; that is, the want of necessity for it.

DOMINICK SZYMANSKI.

Henry D. Saylor and *J. V. Gotwalts, Esqs*, for applicant.

J. H. Maxwell and *Larzelere & Gibson, Esqs.*, contra.

What we just said as to the want of necessity for the Selinger license applies with equal force to this application.

There is no public necessity for a hotel at the applicant's premises. Travelers will not require entertainment at this place—it is too near Pottstown; and the law does not contemplate the establishment

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of a drinking place for the convenience of the surrounding neighbors. The extensive iron works in the vicinity are opposed to the creation of a licensed house, and we do not believe any good purpose is subserved by granting it.

The applicant is a Polander, and will necessarily supply a class of customers that is already provided with abundant drinking privileges. The late murder case from Pottstown convinced us that intoxicating liquors are a great evil to the Hungarians employed in the large manufacturing enterprises in and about Pottstown.

The applicant has a grocery store, and proposes to turn it into a hotel. There is grave doubt whether the court can grant a license to sell liquor at this place even under the promise that the sale of groceries shall terminate before the license is taken out. The act of May 13, 1887, provides: "And no license shall be granted under the provisions of this act to any person to sell in any room where groceries are sold at wholesale or retail." It is not necessary to consider this technical objection, for the want of necessity for the hotel is very apparent.

The license is refused.

EMANUEL GALLAGHER.

James B. Holland, Esq., for applicant.

George N. Corson, Esq., contra.

Admittedly this house was kept in gross violation of the law by the former occupant, Mr. Ward; and the vicious practices then so common are far from being cured under the present applicant's occupancy.

Sales to minors are established by the testimony. It is claimed that the liquor was obtained by a trick. A man of full age would buy the liquor and secretly hand it to the minor, who would drink it without the knowledge of the man behind the bar. This occurred so often that we are inclined to think that the trick was on the part of the seller rather than of the buyer. It appears to us that it was a method employed to shield the hotel-keeper. Be this as it may, it is the duty of the proprietor to see that no minor, known to be such, obtains drink in the bar-room.

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Raffling and shooting matches were advertised to take place at this hotel, and in pursuance of the advertisement were held on the premises, or on the adjoining property so as to escape, as was supposed, the responsibility of the hotel proprietor. A dice-box was kept and handed out to such persons as desired to use it. The witness says he did not throw dice for drinks. A hotel-keeper can have no legitimate use for a dice-box, and we can well infer the uses to which it was put.

The house gives annoyance to the neighbors from the quarrels and fights that occur in and about the premises.

The manner in which the hotel was conducted is a strong argument against relicensing it. To this may be added the further fact that there is no necessity for this house. The surrounding hotels can accommodate the public, travelers and strangers. The house is so near Conshohocken that parties traveling to and from the borough will have no need to use it. We have no doubt that the hotel is dependent for custom entirely upon the local drinking trade. The law does not contemplate the licensing of a house for such purposes —that is, for a mere drinking place.

The license is refused.

JOHN J. OAKLEY.

Charles Hunsicker, Esq., for applicant.

Isaac Chism, Esq., contra.

The application of John J. Oakley, of Conshohocken, is granted. This is an old-established house, and although a remonstrance was filed it was practically withdrawn. The depositions taken by the applicant show a necessity for the house and establish the good character of the applicant. The exception that the application does not specifically give the residence of the applicant is, in our opinion, not well taken, as the petition sets forth that the petitioner resided in Conshohocken since December 11, 1858, and that the house is located in the First ward, corner of Hector and Ash streets, which we think is sufficient.

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In re Liquor Licenses.

THOMAS HOLLAND.

James B. Holland, Esq., for applicant.

Isaac Chism, Esq., contra.

The application of Thomas Holland, of Conshohocken, is granted. The remonstrance sets forth that the house is not necessary, and that the applicant is not a fit person; but no depositions were taken in support of these allegations, whilst the depositions of the applicant abundantly establish the contrary.

JOHN VALLELY.

Jacob V. Gotwalts and *Chas. H. Stinson, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

The objections to the application of John Vallely, of Conshohocken, are that the place is not necessary and that the applicant is not a fit person. Forty-one persons signed the remonstrance, twelve of whom have since withdrawn their names. The petitioner has in his favor eighty-seven signers. The material objection to this application is that Mr. Vallely is not alone interested in the place. It appears that the license had been transferred to a Mr. Mulholland, who was not a naturalized citizen. Upon discovering this fact, the license was retransferred to Vallely, who retains Mulholland as his bartender. If this charge were sustained, we should not grant the license; but we are not convinced that it is true, and give the applicant the benefit of the doubt. We think, however, that the best evidence of the good faith of the transaction would be for Mr. Mulholland to retire, so as to avoid future trouble. In these matters we have a right to demand good faith from those who ask our favors; and when we find our confidence abused, we shall not be slow to act. The house appears to be well located and well kept under Vallely's charge.

We therefore grant the license.

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In re Liquor Licenses.

PHILIP CAFFREY.

Charles Hunsicker, Esq., for applicant.

Isaac Chism, Esq., contra.

A remonstrance was filed against Philip Caffrey's hotel in Conshohocken. We are favorably impressed with the appearance and location of this house. It has been licensed heretofore, and was lately purchased by the applicant, who will be a severe loser if his license is revoked. If he violates the law, of course this would be no excuse; but we do not think the charge of selling to minors, or on Sunday, is sustained. It may be well to remind the applicant that the giving away or allowing liquor to be drank upon the premises on Sunday is illegal, and must be stopped under penalty of a forfeiture of the license. It does not appear what the character of Weiss beer is; but if there is any doubt about its intoxicating qualities there is but one safe course to pursue, and that is not to furnish it to minors. With the evidence before us a conviction before a jury could not be sustained, and we must therefore consider the charges not proved; and lest we do the applicant a great wrong by refusing his license, we are willing to err on the safe side, and therefore grant the license.

EBEN CLARK.

H. B. Dickinson, Esq., for applicant.

Isaac Chism, Esq., contra.

The application of Eben Clark for a renewal of his hotel license in the Seventh ward of Norristown has received careful consideration. We are, however, constrained to refuse the application. The house is not situated on a main street or road, and from its seclusion rebuts the idea that strangers or travelers would seek it for accommodation. It is in close proximity to the hospital for the insane, and is removed from all places of business except the brickyard. The testimony of the applicant shows that he has no custom such as is usual at hotels. During the months of March and April to date he had not entertained any one; and in reply to a question, "How many did you entertain during February?" he answered, "It

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ain't a place for people to stop as they come and stay all night." As he has no boarders and is not on a direct traveled road, it is plain to be seen that the sale of liquor is his primary object. We can very well understand how a hotel might be necessary even where travelers did not remain over night; but when, in addition, the house is not located on a main street or road, and is conducted by a man whose principal business (he says) is horse-training, it is evident that the public in whose interest the license is supposed to be granted can not be benefited by our favorable action, and that if granted the hotel would only be an adjunct to Mr. Clark's other business.

JOHN D. COOPER.

I. P. Wanger, Esq., for applicant.

B. E. Chain, Esq., contra.

The application of John D. Cooper for a hotel license in Whitemarsh township is refused. We have no doubt that this house is well adapted to the purpose intended, and that a boarding-house at that locality is desirable; but we are not convinced that a licensed hotel is necessary. The fact that a former license was allowed to lapse, and that for years no application for its renewal has been made, is strong proof against the plea of necessity. Within a few miles in either direction the weary traveler may find rest and refreshment, and for the mere purposes of a boarding-house no license is required. With the growing disposition on the part of the courts and the community to restrict the number of hotels, we can not consistently say that in our judgment the place is necessary as a hotel.

ALLEN H. HEIST.

D. O. Rogers, Esq., for applicant.

Neville D. Tyson, Esq., contra.

The application of Allen H. Heist for a wholesale liquor store at Mont Clare is refused. The applicant resides in Bucks county and entrusts his liquor store to the care of a man who has been habitually violating the law by selling to minors and to persons of

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intemperate habits. The positive testimony in this case leaves us no alternative but to reject this application. Other reasons, such as the instance of the stolen watch for which liquor was given in trade, might also be cited, but we deem it unnecessary. The place seems to have been carried on more for the accommodation of Phœnixville than any other place; and the scenes of disorder on the bridge caused by this house are a reproach to the good name of our county. There is, besides, no necessity for a wholesale store at this place.

FRANCIS DARRAR.

Henry M. Tracy and *James B. Holland, Esqs.*, for applicant.

Isaac Chism, Esq., contra.

The application of Francis Darrar for a restaurant license in Conshohocken is strongly resisted. The remonstrance has eighty-four signatures; his petitioners number sixty-two. We are satisfied from the testimony of the witnesses and personal inspection of the place that it ought not to be licensed. There is no pretension that this place is anything more than a drinking-saloon, where no refreshments other than drink can be obtained, except, probably, when specially ordered.

The license is refused.

JOSEPH T. KEARNS.

Samuel Money, Jr., Esq., for applicant.

Isaac Chism, Esq., contra.

In the case of Joseph T. Kearns, of Conshohocken, the depositions show that he has no eating-bar or accommodations for eating, and that he allows quoit pitching for drinks, and that his establishment is a place of amusement. Either of these reasons is sufficient for refusing him a license. Besides, his place adjoins that of Darrar, and is on the same street and within a square of those of Quigley and Mullen. All of these places are on the direct route taken by many persons who are employed in the iron works along the railroad, affording temptation day and night to those who can ill afford

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to squander their hard-earned gains. No reasonable man can consistently say that either the house of Quigley, Darrar or Kearns is necessary to accommodate the public as a restaurant. They are in no sense of the word such, within the meaning of the law; and no matter what the requirements of Conshohocken may be to have a place where eatables can at all times be obtained, we are clear that Kearns' place is not worthy of a license, and it is accordingly refused.

JOHN L. CRIMEAN.

Jacob V. Gotwalts, Esq., for applicant.

Isaac Chism, Esq., contra.

In the case of John L. Crimean the remonstrance has thirty-seven signers (eleven of whom withdraw their names), and alleges that the house is not necessary, that the applicant is not a fit person, and that the petition is defective in stating Crimean's residence only as being in Conshohocken, although it also states the name of the house and its proper location. The license is asked for by ninety-two persons. But one witness was examined in the case; he was a boy twenty years of age, who bought beer not drank upon the premises, and who, when asked his age, told Mr. Crimean that he was twenty-one. We do not consider the evidence sufficient to convict the applicant of selling to minors, although we disapprove of selling in kettles to be taken away. In the face of the overwhelming number of signers for the license we are not willing to take away the license after the applicant has improved his property on the strength of the former license granted him. We do not think the technical objections to the petition well taken.

The license is granted.

WESLEY GIBBS.

H. B. Dickinson, Esq., for applicant.

Isaac Chism, Esq., contra.

Wesley Gibbs presents a petition for a new hotel license in Montgomery township. He presents a petition numerously signed, and is a person of good character except as hereinafter stated. We do

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not think, however, that a hotel at this place is necessary. Some years since the place was licensed and abandoned as a hotel. Since then there has been no apparent increase in travel, but on the contrary a great falling off. The railroads have driven away the stage-coach and the hucksters, and the other hotels within convenient distances seem to afford all the necessary accommodations required. It also appears that the applicant furnished liquor to a minor, who got drunk.

We are therefore constrained to refuse the application.

COMMONWEALTH VS. MCLAUGHLIN.

A mandamus from the Superior Court to a lower court will lie to compel the performance of a duty when the judge declines to act or unreasonably delays judgment in a particular case, but it will not lie to compel him to give judgment in a particular way; it will only require him to act.

When a judge of the Court of Quarter Sessions, for reasons which he regards as legal and satisfactory, has refused to direct the Sheriff to abate a nuisance, after the person sentenced to abate the same has failed to do so, the Supreme Court can not reverse his decision upon a writ of mandamus, even were they satisfied that it was erroneous.

PETITION of District Attorney Wanger for mandamus to the judges of the Court of Quarter Sessions of Montgomery county.

In the court below there was an application for an order upon the Sheriff to abate a nuisance, upon which the following opinion was delivered by SWARTZ, P. J.:

The indictment contained but one count, and charged that the defendants erected and set up a magazine for storing dangerous explosive substances, and that they did unlawfully and injuriously keep and still do keep gun-powder, nitro-glycerine and dynamite in said magazine.

The defendant, McLaughlin, was convicted generally and sentenced to pay a fine of $150, costs of prosecution, and to abate the nuisance. We are now asked to command the Sheriff to abate the nuisance, upon the ground that the defendant failed to observe this part of the sentence. The defendant answers that he was but an employe in and about the magazine, and that he has nothing further

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to do with it, as he left the employment. He admits that he maintained a small frame building, where dynamite was kept; that this was his individual venture, and had no connection with the magazine. He removed the building before the indictment was found.

Upon the trial of the case there was testimony submitted to the effect that the magazine was a nuisance by reason of its location being in proximity to the public highways, mills, factories and dwellings. It was also alleged that the store-house was improperly kept, because of the large quantity of explosives found there. It was shown that the defendant was employed about the premises, that he hauled the explosives from the railroad depot to the magazine, and removed them from there to supply customers. The Hazzard Powder Company holds title to the premises. From the testimony adduced at the trial and from the affidavits now filed in this application we think it is clear that the defendant was the employe of the owners, proprietors or lessees of the magazine. He swears he was engaged as driver of the team used about the business, that his father employed him. There was not a particle of testimony to show that he had anything to do with the erection of the powder house. True he was convicted generally, but we can not say that the jury thereby meant anything more than to find that he was an employe in a firm engaged in unlawfully and injuriously keeping large quantities of explosives in the store-house to the common nuisance of all good citizens.

He was charged with maintaining a common nuisance, and it was the duty of the jury to find him guilty, if he with the aid of others unlawfully and injuriously stored explosives as alleged in the indictment, even if he had nothing to do with the unlawful erection of the magazine. The jury could have found him guilty and yet find that the erection of the magazine under the surroundings was entirely lawful.

If he left the employment, and is no longer engaged in storing these explosives, what more can he do? If the proprietors of the magazine employ other persons to continue the nuisance by storing explosives, this does not give the defendant the right to go to the magazine and destroy or remove the property over which he has no control and which he did not place there. If he can not remove the goods from the magazine we can not direct the Sheriff to

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do it for him. The ground upon which the Sheriff acts is the refusal of the defendant to do that which he ought to have done.

It was alleged that Russel and Mason, the co-defendants, were the lessees or proprietors of the establishment; if the evidence had been sufficient to sustain a conviction against them the abatement of the nuisance would have been a simple matter.

This magazine maintained as it has been is no doubt a source of great annoyance to the community, but this fact does not authorize us to suppress it except by legal methods.

And now March 5, 1888, the application is refused.

I. P. Wanger and *G. R. Fox & Son, Esqs.*, for commonwealth.

H. B. Dickinson, Esq., contra.

The opinion of the Supreme Court was delivered May 21, 1888, by Mr. Justice Paxson.

This was a petition by Irving P. Wanger, Esq., District Attorney of Montgomery county, praying for a writ of mandamus to the Judges of the Court of Quarter Sessions of Montgomery county, to enforce the judgment and sentence of the said court in the above stated case by an order directed to the Sheriff of said county, requiring him forthwith to abate the nuisance complained of, at the cost of the defendant.

The defendant has been convicted in the court below of maintaining a public nuisance, and had been sentenced to pay a fine and abate the nuisance. The nuisance consisted of the storage of a large quantity of gun-powder and dynamite in a building near a public highway, to the damage of the neighbors and traveling public. It was not the building that was the nuisance; it was the storage of the above named explosives and dangerous substances therein. Upon proceeding to enforce the sentence, the defendant showed that he was not the owner of the premises; that he was merely the agent at one time of the parties who used the building as a storehouse for powder, and that since the trial he was no longer such agent and had no control over the building or its contents. The court below held that the defendant could not be required to abate a nuisance over which he has no control, and that the Sheriff could not be required to remove it, inasmuch as the ground upon which

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he acts in such cases is the refusal of the defendant to do what he ought to have done.

It will appear, from what has been said, that the court below acted upon the application of the District Attorney, and refused it. If the court had declined to act there might have been some ground for the application of a mandamus. That the writ will lie from this court to a lower court to compel the performance of a duty is settled law. Thus if a Judge unreasonably delays judgment in a particular case, he may be compelled to do so by mandamus. But it will not lie to compel him to give judgment in a particular way; it will only require him to act. Hence, when the Judge has acted, mandamus will not lie to reverse his action. The Judge below has acted in the matter referred to; he has refused to order the Sheriff to proceed to abate the nuisance, for reasons which he regards as legal and satisfactory, and we cannot reverse his decision upon a writ of mandamus, even were we satisfied that it is erroneous. We are free to say, however, that we see no reason why the learned court below should have arrived at a different conclusion.

Writ refused.

Court of Common Pleas of Montgomery County.

J. JARRETT DAGER VS. MARKOE ET AL.

Unless notice, as required by said act, is averred in the lien, it will be stricken off on motion.
The act construed to apply to cases where the agreement to furnish materials was made before the act, and the articles furnished afterwards.
The second section of the act held to be constitutional.

RULE to strike off liens.

The facts of the case appear from the opinion of the court, delivered June 4, 1888, by WEAND, J.

The defendants in these cases move to strike off the liens because they do not set forth on their face that notice of the amount and character of the claim was given when the materials were delivered, or within ten days thereafter, as required by the act of June 17, 1887, P. L. 413.

The questions raised by the pleadings are:

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1. Is such notice necessary to be set forth in the lien, or is it merely the subject of proof on the trial?

2. Does the act apply to cases where part of the materials were furnished before and part after the passage of the act, or where agreement to furnish the materials was made before the act and the materials furnished afterwards?

3. Is the act constitutional?

The words of the act are "No material man shall *file* a lien unless notice, etc., be given," and it is therefore plain that the *right* to file is dependent upon the giving of the notice. The lien when filed is the claimant's statement of his cause of action, and requires no further declaration. It ought, therefore, to be as specific as a narr should be in cases where the action was brought under a statute limiting the right to bring suit after performance of a condition precedent, and by all rules of pleading the fact of performance should be averred in the statement of claim. The motion to strike off is to be treated as a demurrer; and if the record does not in itself show a right to sue or to maintain the suit, it is fatal. A mechanics' lien, like a narr, should on its face show every material fact necessary to maintain the lien, so that from inspection the court may judge of its sufficiency. It can scarcely be pretended that in an action against an endorser of a protested note that the declaration would be sufficient if it did not aver demand and notice or an excuse therefor.

In Zerger vs. Sailer, 6 Binn., 24, C. J. Tilghman said: "The general principle is that where several things are to be done by the plaintiff precedent to the performance of the defendant's part of the agreement, it is necessary for the plaintiff to aver the performance of all the things to be done by him."

This was the view taken by Judge Allison in Lucas vs. Ruff, 45 Leg. Int., 154, who further says: "It is not, therefore, a question of supporting the lien by subsequent proof of notice, but whether the claim *asserts* notice when it is offered to be filed. The omission of such an averment is as fatal a defect as would be the failure to state the time or times when the materials were delivered."

The cases of Loomis vs. Fry, 10 Norris, 396; Einstein vs. Jennison, 14 Norris, 403; and Steriman vs. Henderson, 13 Norris, 315, were cases in which the liens were filed against the property of mar-

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ried women, but they are analogous in principle and support the doctrine here laid down. We are therefore of opinion that where a mechanics' lien is filed by a material man under the act of 1887 the fact of notice must be averred in the lien, and in default thereof it will on motion be stricken off.

The plaintiff, however, contends that as his claim is for materials bargained for before the act of 1887 and furnished before and afterwards, that he is not affected by the act, and that to give it a retrospective effect would be to impair the obligation of his contract. We do not see how its application can have any such effect or do him any injury. It does not change the time within which he can file his lien, nor does it apply to materials furnished before its passage of which he could not have given the notice. The claim, however, as filed, states that it is for stone furnished between October 1, 1886, and November 8, 1887, and a gross amount of $340.85 is given. If, therefore, there is any difficulty about this matter, it arises from the fact that the lien or statement does not specify dates and times when furnished. There is nothing to show that they were furnished continuously, and it might be that only a small proportion were furnished in October and the balance after June 17th. Certainly, therefore, the fact of a previous furnishing of a part can not nullify the terms of the act, which might be read "hereafter no lien shall be filed," etc. The act, however, does not impair the obligation of a contract but only affects the remedy, and is therefore not unconstitutional.

In Evans vs. Montgomery, 4 W. & S., 218, it was held that the Legislature may pass laws altering, modifying, or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the Constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligations of contracts.

In Knor vs. Browne, 14 P. F. S., 55, the act of April 27, 1858 (limitation of ground rents), was held to be retrospective and not unconstitutional.

In Ross vs. Duval, 13 Peters, 64, it was asserted as "a sound principle that where a statute of limitations prescribed the time within which suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature in such cases."

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In Phillips' Appeal, 10 W. W. N. C., 525, the act of April 22, 1856, P. L. 534, providing a mode to compel contribution where the real estate of several persons is subject to a common incumbrance, was held to be applicable to cases where the incumbrance, etc., arose prior to the act and proceedings commenced subsequent to its passage, the court holding that it is only a modification of an existing remedy, and in no way infringes any clause in the Federal or State Constitution.

In Forcht vs. Short, 45 Mo., 377, cited in Phillips on Mechanics' Liens, p. 35, Sec. 24, it was said: "Where a lienor had at the time of doing the work nine months in which to bring his action, if a subsequent statute limited the time to ninety days the lien will be lost unless brought within the latter period." In 15 Wis., 298, cited in same book, "where work had been done, and before the expiration of the time within which he might have proceeded to enforce his lien a new remedy was furnished, it was considered competent to proceed to its enforcement under the subsequent statute."

It follows, therefore, that the plaintiff in this case comes within the provisions of the act of 1887, and should have averred notice in his lien for all materials furnished subsequently to the passage of the act. If we treat him as a sub-contractor he is in no better position, for then his lien was not filed in time, and as to all of it he gives no dates, quantities or values, such as are required by law.

The constitutionality of the act is also questioned, because the subject to which it refers is not clearly expressed in the title; and that being an amendment, and not a supplement, the law as amended must be re-enacted and published at length, in accordance with Article III, Section 6, of the Constitution. The junior counsel who argued one of the cases which give rise to this controversy has submitted a well written brief upon this point, but as this very point has already been decided in favor of the constitutionality of the second section of the act by Judges Mitchell, Arnold and Allison, of the Philadelphia courts, we see no reason to differ with their conclusions, as it would only be an affectation of learning to add anything further to the reasoning of the learned Judge who decided the case of Lucas vs. Ruff, *supra*. This view of the matter is further

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sustained by the case of Bank vs. Caldwell, District Court U. S., 39 Leg. Int., 414.

And now, June 4, 1888, the rule is made absolute and liens ordered to be stricken from the record.

IN EQUITY.

WILLIAM SIMPSON & SONS VS. PHILADELPHIA AND READING RAILROAD COMPANY.

The Legislature may authorize the building of a railroad on a street or other highway; and if the power is given by plain words or necessary implication, it may be exercised.

A railroad company is not required to exhaust its entire grant in the first instance, but additional tracks may be laid within the stipulated width of the grant as necessity shall require.

The act of June 9, 1874, P. L. 282, can not interfere with the vested rights of a defendant corporation.

MOTION to dissolve preliminary injunctions.

George N. Corson, J. P. Hale Jenkins, Theo. W. Bean and *Frank L. Murphy, Esqs.*, for complainants.

George R. Kaercher and *James Boyd, Esqs.*, for defendant.

The facts fully appear from the opinion of the court delivered June 4, 1888, by SWARTZ, P. J.

Simpson & Sons amended their original bill, and we shall consider this motion as if the amendment had been made before the injunction was awarded. No new questions are raised by the amendment. The Philadelphia, Germantown and Norristown Railroad Company constructed its road on Washington street in the borough of Norristown. The charter of incorporation called for a double track road, beginning at Stony creek, in the borough of Norristown, and terminating in the city of Philadelphia, with two branches. The Town Council of Norristown passed a resolution giving full permission for such construction on Washington street, and subsequently this resolution and permission were ratified and confirmed by act of the Legislature.

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According to the draft furnished by complainants, the original construction of the road left a passage-way for horses and vehicles ten feet wide on the north side of Washington street and a similar way on the south side of the street seven and one-half feet wide, measuring in each case from the outer rail to the nearest curb line. These tracks so built were maintained for many years, but for the last seven years only one of them could be used to any advantage by reason of the transportation of passenger cars over this street. The two tracks were laid so near to each other that two passenger cars or two freight cars could not pass each other. That the two tracks as formerly located could not be used for the usual and ordinary road purposes is shown by the complainants themselves.

In April last the south track was shifted, as shown by the complainant's draft, two and one-half feet further away from the north track. The complainants allege that this act on the part of the defendant company or companies in changing the south track is unlawful and works irreparable damage to Simpson & Sons. The act, we find, was not unlawful, and the defendants in doing it discharged an obligation imposed by the Legislature itself. The company was to make its road double to accommodate the trade ascending as well as descending. Unless the two tracks are so maintained that both may be operated at the same time, the road can not be said to be double.

It is argued that the defendants in shifting the south track failed to show a due regard for the interests of the borough; that the occupancy of the highway equi-distant on each side from the centre line of the street would have been preferable. Such a use of the highway would have destroyed both the north and south passage-ways for horses and vehicles, for it would leave a space of but seven and one-half feet from the outer rail to the nearest curb line; and taking from this passage-way the width of the car extending beyond the rail, as shown by Mr. Calhoun, we have an open space of but four and one-half feet to five feet wide on each side of the street. The assertion that under the original location and construction a good passage-way was preserved on the south side of the street is not well founded. There never was a good passage-way there; for, as just shown, the space before the shifting was but seven and one-half feet from rail to curb, or but four and one-half feet to five feet in the clear with a car on the south track. To invite travel on such a passage-way with moving cars on the south track is to invite a trav-

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eler to enter a death-trap. But it is argued that the width of the pavements can be reduced. There is no evidence of any such intent on the part of the borough; but, on the contrary, the borough surveyor, called by complainants, says that such reduction is impracticable because of the steps on the pavements necessary to enter the houses.

It can not be questioned at this late day that the Legislature may authorize the building of a railroad on a street or other highway. If the power is given in plain words or by necessary implication it may be exercised: Pittsburg vs. Penna. R. R., 48 Pa., 355; Com. vs. Erie and N. E. R. R., 27 Pa., 339.

This act of incorporation gives power "to survey, lay down, ascertain, mark and fix such route as they shall deem expedient for said road." Grave-yards, places of public worship and dwellings were excepted. These could not be disturbed. The exception implies necessarily the right to adopt any other route deemed expedient *expressio unus est exclusio alterius.* More than this, the Legislature gave the corporation direct permission to occupy this particular street, and in doing this they gave effect to the wishes of the borough council as expressed in their resolution.

If we continue this injunction we are saying in effect: "You have a right to occupy Washington street with a double track, and the Legislature makes it obligatory that you should occupy with a double railroad if you enter the street at all, but you must so construct and lay your tracks that but one of them can be used at the same time." The law will not sustain such an anomalous condition of affairs.

The defendants may occupy Washington street by double tracks, and such double tracks must be suitable to the demands of the railroad traffic, and must be furnished with the appliances and conveniences in known use and approved by experience. This is all that the defendants propose to do, as shown by the uncontradicted evidence. Whether the Town Council assented to the shifting of the tracks is immaterial; the borough authorities can not defeat a grant from the Legislature.

The act of June 9, 1874, P. L. 282, has no application; even if it was intended to apply to facts such as are raised in this case it can not interfere with this corporation in its vested rights: Williamsport Passenger R. R. Co.'s Appeal, decided April 18, 1888.

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Whether the original taking covers the part of the street now occupied by the company is immaterial. We are now considering the right to occupy the street, not the question whether damages can be recovered against the company for such occupancy. The company was not required to exhaust its grant of four rods in the first instance. They were not required to make provision for the unknown wants of the future when they first started out. Additional tracks may be laid within the stipulated width of the grant as necessity shall require: Black vs. Phila. & Reading R. R. Co., 58 Pa., 252.

And now, June 4, 1888, the preliminary injunction is dissolved.

JOHN G. BEAN VS. SARAH STELTZ.

Conditions of sale are merged in the subsequent conveyance, and can not be given in evidence unless they impose conditions not contained in the deed.

The words "grant, bargain and sale" constitute an implied covenant applicable only to acts done by the grantor, and not by former owners.

A servitude, consisting of a mill-pond and race on lands of an upper owner, to supply water to the mill of a lower owner affects not the title but the physical condition of the property. Failure to disclose the existence of such an encumbrance by the grantor can not be assigned as a breach of warranty even if the deed should contain a general warranty.

MOTION to take off non-suit.

This was an action for breach of the covenants contained in a deed. On the trial plaintiff offered a deed from defendant to plaintiff for a farm containing a clause of special warranty. The plaintiff then offered a deed from Jonas Steltz, a former owner of the premises, to one Jonas Christman, a lower mill owner, for the right to maintain a mill dam and race upon his farm. This on objection was not received.

Plaintiff was non-suited.

H. U. Brunner and *J. A. Strassburger, Esqs.*, for rule to take off non-suit.

Bickel & Hobson, Esqs., contra.

The further facts fully appear from the opinion of the court delivered June 4, 1888, by SWARTZ, P. J.

The articles of agreement for the purchase of the land at public sale merged in the subsequent conveyance of the land, and could

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not be admitted in evidence. There is no allegation that the articles imposed any further conditions upon the grantor than those assumed in the deed. Cox's Admrs. vs. Henry, 32 Penna., 18.

When a condition is performed it is thenceforth merged and gone. The presumption of law is that the acceptance of a deed in pursuance of articles is a satisfaction of all previous covenants. Shantz vs. Brown, 27 Penna., 131.

The plaintiff offered to prove that he purchased defendant's farm at public sale and obtained a deed containing covenants of special warranty against the grantor and those claiming under her.

Jonas Steltz, a former owner of the land, granted to Jonas Christman, a lower mill owner, the right to maintain a mill dam and race upon this farm, and also the privilege of swelling back the water. This grant was made in 1864, sixteen years before the defendant obtained title. The plaintiff offered to show that he had no notice of this encumbrance before he took possession, and that Christman's assigns in the title entered upon the farm from time to time to repair the dam and race. Can the plaintiff recover upon this alleged breach of the covenants in the deed?

The plaintiff has not offered to show any breach of the covenant of warranty against the defendant and those claiming under her. This is not a suit by the grantor to recover purchase money and a defence by the grantee or debtor by reason of encumbrances against the grantor or those under whom he claims. Noblest vs. Lucas, 10 Penna., 73.

The words "grant, bargain and sale," under the act of May 28, 1715, constitute an implied covenant that the "*grantor* has done no act nor created any encumbrance whereby the estate granted by him might be defeated." The covenant does not include former owners. Knepper vs. Kurtz, 58 Penna., 484; Whitehill vs. Gotwalt, 3 P. & W., 313; Gratz vs. Enalt, 2 Bin., 25.

Even if the encumbrance had been created by the grantor or the deed contained a general warranty, the plaintiff could not recover, because the servitude imposed upon this farm is visible to the eye and affects not the title but the physical condition of the property. Memmert vs. McKeen, 112 Penna., 320.

The dam is a structure that the purchaser could and ought to have seen. The race on the farm conducted the water to the mill. He saw that the mill was not on his farm, and yet the maintenance

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of the dam and race and swelling of the water were the life of the mill. Without the servitude the mill could not survive. He must have known that he could not destroy the dam and race. He is, therefore, presumed to have known of this encumbrance and to have governed himself accordingly in fixing the price at the purchase of the farm. He purchased at public sale against bidders who no doubt knew what they were buying and allowed the plaintiff to buy at a lower figure because of this encumbrance. If he now recovers damages by reason of the servitude the grantor suffers a double diminution of the purchase money from the encumbrance—once at the sale, again by the suit. Wilson vs. Cochran, 48 Penna., 107.

In the case of Kutz vs. McCum, 22 Wis., 628, it was held that flooding land by the erection of a dam was not an encumbrance within the covenant; that vendors are not liable on their covenants by reason of its existence, because the servitude was obvious and notorious, affecting only the physical condition of the property. This case was cited with approval in Memmert vs. McKeen, *supra*, and rules the case at bar.

The entering upon the farm to repair was a necessary incident to the servitude. The right to have the dam and race includes the right to maintain and repair: Scheetz's Appeal, 35 Penna., 88. In making these entries to maintain and repair no injury must be done except such as may be necessary, and this is all the grant gives to Christman and his assigns.

It is questionable even whether the evidence offered shows such an eviction as will sustain covenant on warranty. The grantee must show that he has been evicted under a paramount title. Spear vs. Allison, 20 Penna., 200; Knepper vs. Kurtz, 58 Penna., 484; Patton vs. McFarlane, 3 P. & W., 419.

In answer to the argument that by the grant Steltz sold to Christman all the water of Swamp creek, it is sufficient to say that we do not so read the instrument. The grant gives the privilege "to lead and convey the water of Swamp creek from the dam along the race or water-course dug on the lands of the said Jonas Steltz." There was no intent to sell the water of the stream; Christman had the same title to the flowing stream as Steltz. No one can have an exclusive right to the aggregate drops that compose the masses flowing in the stream. Mayor vs. Commissioners, 7 Penna., 363.

And now, June 4, 1888, the rule to take off the non-suit is discharged.

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REUBEN T. HALLMAN TO USE, ETC., VS. JAMES T. HALLMAN.

A waiver of the debtor's exemption in a judgment which is a first lien on real estate, enures to the benefit of a second judgment having no waiver, so that the defendant can get no part of the $300 claimed, although the first judgment is for less than that amount, the fund being insufficient to pay both judgments.

CASE stated.

L. M. Childs, Esq., for plaintiff.

Wm. F. Dannehower, Esq., for defendant.

The facts of the case appear from the opinion of the court, delivered June 4, 1888, by WEAND, J.

The question raised by this record is whether a waiver of exemption in a judgment which is a first lien on real estate, the proceeds of which is in court for distribution, enures to the benefit of a second judgment having no waiver, so that the defendant can get no part of the $300 claimed, although the first lien is less than that amount. It is rather a singular fact that no decision of the Supreme Court of this state clearly decides this point so as to leave it free from difficulty.

The fund amounts to $700, and if we distribute it under the principles laid down in Shelly's Appeal, 36 Penna. St. R., 373; Pittman's Appeal, 48 Id., 319; Thomas's Appeal, 69 Id., and other kindred cases, we would first have to set apart $300 for the debtor, from which would have to be deducted the amount of the first judgment, $70, and give the defendant the difference, the balance of the whole fund going to the second judgment. In this way the defendant gets his exemption, less the amount of the judgment in which he has waived it.

In Jimison's Appeal, 13 W. N. C., 25, and 1 Chester Co. Rep., 571, the per curiam opinion reads: "Had the sale been on execution by the Sheriff, it is well settled the appellant (the debtor) could not have claimed $300 out of the proceeds to the injury of other lien creditors. Among creditors having existing liens on the same property, the law and not the will of the debtor regulates the priority of liens. Having waived the right of this exemption in the one lien, the appellant can not claim it out of the same court to the injury of the other liens." In that case the waiver was contained in the first judgment and the sale was made by an assignee for the benefit of creditors under an order of court.

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This language is so general as to warrant a belief that the Supreme Court meant it to cover the point in controversy here and to carry into effect the words used by Judge Black in Bowyer's Appeal, 9 Harris, 210: "He must make his claim, if he make it at all, in good faith to carry out the very purpose of the law, and no other. All transfers and all waivers of his right, whether express or implied, enure to the benefit of his creditors in the proper order of their liens. Whatever he does not claim for himself or his family he leaves in the general fund, under the control of the court, to be distributed among those who are legally entitled to it; and such distribution is not to be regulated by any wish of his, no matter in what form he may choose to express it." Judge Futhey, a very respectable authority, adopted this view of the decision when, in the case of Taylor vs. Webb, 2 Chester Co. Rep., 16, he ruled that "a waiver of exemption in a judgment which is a first lien, enures to the benefit of subsequent lien creditors." Whilst the question is still not free from doubt, we incline to the belief that these two cases rule it in favor of the second lien creditor to the exclusion of the defendant to receive any part of the fund.

And now, June 4, 1888, judgment is directed to be entered for the plaintiff with costs.

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A. H. ANDREWS & CO. vs. WEAVER & ROBERTS.

Where there is an actual sale of goods, carried into effect by an actual delivery, the title will pass, even although something remain to be done by the vendor in relation to the goods sold, after their delivery to the vendee.

A agreed to sell to B five hundred opera chairs on sixty days credit, to be delivered in knock-down shape. A was also to send a man to assist and superintend in placing the chairs on the floor. The chairs were delivered at the opera house, and whilst A's man was engaged in fastening them to the floor they were levied upon by B's creditors. *Held*, that the property in the chairs had passed to B by delivery, although not fastened to the floor

CASE stated.

Theo. W. Bean, Esq., for plaintiffs.

L. M. Childs, Esq., for defendants.

The facts of the case appear from the opinion of the court, delivered June 4, 1888, by WEAND, J.

By the agreement, which is made part of the case stated, plaintiffs agreed to sell to C. P. Weaver, who was the lessee of an opera house in Norristown, Pa., five hundred more or less opera chairs, to be delivered at Norristown in knock-down shape—i. e., not put together. The plaintiffs were also to send one man to assist and superintend in placing the chairs on the floor. The chairs were duly delivered at the opera house before July 6th, but before they were all fastened to the floor the Sheriff made a levy upon them as the property of Weaver. At the time of the levy about one hundred chairs were still unfastened. Payment was to be made within sixty days after the completion of the work.

The sole question submitted to the court is whether, under the agreement and the facts, there was a delivery to Weaver, the purchaser, on or before July 6th, the date of levy, so as to vest the title in him.

It is contended on the part of the plaintiffs that this was a conditional sale, and that no title passed from the vendors until the chairs were fastened to the floor, and that until the completion of that work they had the right to remove the property on discovering the insolvency of Weaver.

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This case does not come within the rule "that when something remains to be done between the vendor and vendee for the purpose of ascertaining the amount and price of the article, the property and risk remain in the vendor," for here the number and price of the articles were ascertained and future time of payment fixed.

If plaintiffs can succeed in their claim it must be upon some other principle governing the law of sales. In Benjamin on Sales, page 245, Section 318, the law is thus stated: "Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. And on page 263, Section 331, he also says: "But the property in goods will pass, even though something remain to be done by the vendor, in relation to the goods sold, after their delivery to the vendee."

Was then the delivery in this case complete, according to the intention of the parties? On referring to the agreement we find that plaintiffs were to deliver the chairs at Norristown, which was done, and they actually passed into the possession of the vendee. If plaintiffs had at that time neglected or refused to send a man to assist and superintend the fastening to the floor, Weaver could have held the goods until they had done so, or he could have employed a competent person to do this work and charged the cost to plaintiffs. Having once relinquished possession of the goods, plaintiffs could not arbitrarily have broken their agreement and taken the chairs away. By the agreement all the work was to be done by July 1st, and in this respect they violated the contract, so that according to their own terms the time had gone by when by their own agreement they were to complete the work. Clearly, then, on July 1st, after the goods were delivered, Weaver became the owner, and his rights could not be changed by plaintiffs afterwards sending their man to do that which was to have been done before.

The goods were in a deliverable shape—had been delivered—were in the possession and control of the vendee under such circumstances as that he could have successfully resisted any attempt to remove them by the vendors. The affixing to the floor was not

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a condition precedent to the delivery, and the delivery as against the vendors changed the ownership.

In Macomber vs. Parker, 13 Pickering, 175, it is said: "The general principle is that where any operation of weight, measurement, counting, or the like, remains to be performed in order to ascertain the price, the quantity, or the particular commodity to be delivered, and to put it in a *deliverable* state, the contract is incomplete until such operation is performed." Brown on Sales, 44: "But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price."

In Sumner vs. Hamlet, 12 Pickering, 76, C. J. Sharswood thus states the law: "As to the rule of law that where anything remains to be done, either to finish commodities for use or put them in a merchantable condition, or where any act remains to be done to ascertain the amount and price, as measuring, weighing, or separating from a mass, we have no doubt of the correctness of the rule. The rule applies to cases of constructive delivery and constructive possession; and the rule is resorted to for the purpose of determining when the contract of sale is so far complete as to pass the property, according to the intent of the parties in their contract. But where there is an actual sale, mortgage or pledge of unfinished goods, so intended and so carried into effect by an actual delivery, there can be no doubt that such a contract is valid in law, and passes the property." We think the plain intent and meaning of this agreement was that title to the chairs should pass on delivery, and as they were duly delivered and four-fifths of them in position the title in Weaver was complete.

And now, June 4, 1888, judgment is entered in favor of defendants on the case stated.

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Assigned Estate of George H. Baker.

An assignee's sale, ordered by the court under the act of February 17, 1876, will not be set aside merely because the return was not made to the term to which it was returnable, the sale having been held at the time designated in the order.

Sur exceptions to confirmation of sale by assignee, under act of Assembly of February 17, 1876.

Bickel & Hobson, Esqs., for exceptants.

Charles Hunsicker and *Neville D. Tyson, Esqs.*, contra.

The facts of the case sufficiently appear from the opinion of the court delivered June 4, 1888, by Weand, J.

The exceptions in this case are two-fold.

1. That the sale was not returned until after the expiration of the term to which it was returnable.

2. Inadequacy of price.

The act of February 17, 1876, under which this sale was ordered, does not fix any time or term to which the order shall be returnable, but authorizes the court to empower the assignee to make public sale, etc., at such place and upon such terms as the said court shall direct.

The form of order adopted by this court and in this case provides that the "order shall be expended at March term, 1888, unless extended by said court."

March term, 1888, began March 5th and continued two weeks. An adjourned court for the trial of civil causes had been ordered for March 19th, to continue one week.

The return to the order of sale was filed March 24th, although the sale was held on Thursday, March 1, 1888, the time designated in the order of court.

Everything therefore was regular except the delay in making the return during the March term.

It was within the power of the court to have continued the order on application for that purpose, and the directions contained therein were merely directory, and an approval of the sale now will be equivalent to an approval of the continuance or delay.

In Rhawn vs. North, 2 Yeates, 117, it was said that a return of an Orphans' Court sale at the ensuing court is the general practice. The act of June 4th directs that the administrator shall bring his proceedings to the next Orphans' Court after the sale made. The

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words of the law appear only directory, and I see no reason why a regular fair sale may not be returned at another court. No injury is done thereby.

As the whole proceeding is entirely under the control of the court, and no injury can be done by an approval of the sale where no other reason for its non-approval is assigned, we are not willing to set aside a fair regular sale merely because of a mistake such as exists in this case.

Depositions were taken to show that the prices at which the properties sold were inadequate, but we have no assurance that they will bring more at another sale. There may be cases where the inadequacy of price is so great as to justify the court in ordering a new sale without security, but the facts of this particular case are not in our opinion sufficient to warrant us in so doing.

And now, June 4th, the exceptions are overruled and sale confirmed.

Court of Quarter Sessions of Montgomery County.

Road in Pottsgrove Township.

Where a road is laid out through a public school-house, and neither the report nor depositions show the necessity therefor, the report will be set aside on exceptions.
Extension of Second Street, 23 Penna. St. R., 346, followed.

Exceptions to report of a jury laying out a road in the township of Pottsgrove.

Miller D. Evans and *James B. Holland, Esqs.*, for exceptions.

Jacob A. Strassburger, Esq., contra.

The facts of the case sufficiently appear from the opinion of the court delivered June 4, 1888, by Weand, J.

The draft returned with the report shows that the road as laid out will take about ten feet of a public school-house. Neither the report nor deposition show any necessity therefor except to preserve the alignment. It was said in Extension of Second Street in Columbia, 23 Penna. St. R., 346, that if the road can not be opened without removing a dwelling-house or an important public building,

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the necessity for the location of it should appear affirmatively. The mere avoidance of a slight curvature in the road is not such a necessity as will justify the location of a road through a dwelling-house.

By a slight curvature in this road the evil complained of could have been obviated, and we think that should have been done, unless good cause can be shown for taking the school-house, which should appear on the report. Without inquiring further into the merits of the case we have concluded that our duty is to set aside the report.

And now, June 4, 1888, the exceptions are sustained and the report set aside.

Court of Quarter Sessions of Chester County.

IN RE BRIDGE OVER THE SCHUYLKILL RIVER AT POTTSTOWN.

Where one of the petitioners for a county bridge was also a member of the grand jury who acted on the report of the viewers and concurred in the report, the action of the grand jury will be set aside and the report of the viewers submitted to another grand jury.

R. T. Comwell, Esq., for bridge.

W. M. Hayes, Esq., contra.

The facts appear in the opinion of the court delivered July 2, 1888, by FUTHEY, P. J.

On petition for an inter-county bridge over the Schuylkill river at Pottstown, on the line of Chester and Montgomery counties, viewers were appointed, who reported in favor of such a bridge. This report was laid before the grand jury of Chester county at January sessions, 1888, and that body concurred with the viewers. Exceptions have been filed to the action of the grand jury, alleging that one of the petitioners for the bridge was also a member of the grand jury. We find on examination that such was the fact.

The act of Assembly of 1836, in relation to the erection of county bridges, provides that on petition the court shall order a view, as in the case of roads; and if, on the favorable report of the viewers, it shall further appear to the court, grand jury and county commission-

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ers that such bridge is necessary and would be too expensive for the township or townships to bear, it shall be entered on record as a county bridge. It thus requires the concurrent favorable action of the viewers, court, grand jury and county commissioners to authorize a county bridge.

This action, the law contemplates, shall be by persons who have no interest as parties to the proceedings. The grand juror referred to was a petitioner for the bridge, and hence a party. As a grand juror he was acting on his own application. True he was but one of a large number who signed the petition, but he was none the less a party. While, therefore, on the one hand, acting as a grand juror, and in that capacity representing and looking to the interests of the public, he was inquiring into the necessity for the erection of a bridge and whether the counties of Chester and Montgomery should bear the expense; on the other hand, as a party petitioner, he was by that act representing to the body of which he was a member that a bridge was necessary and should be erected at the expense of the two counties. These positions are clearly incompatible.

If the attention of the court had been called to the matter at the time, we would undoubtedly have required the withdrawal of the juror. As the case stands, no further action having yet been taken, our duty requires us, now that our attention is called to it, to set aside the finding of the grand jury and to submit the report to another grand jury for its action. This view of the duty of the court is in accordance with that laid down by the Supreme Court in the case of the Nescopeck Bridge, reported in 21 W. N. C., 426, where a similar question arose. See the same case in the lower court, reported in 3 Kulp, 196, 2 Del. Co. Rep., 235.

The question is not as to what influence the juror may have exercised over his fellows, or whether he exercised any, or what would have been the result had he not been present. The policy of the law does not allow persons to sit in judgment in cases in which they are interested as parties.

It was doubtless through inadvertence that the juror referred to sat on the hearing of the case, but his sitting was none the less fatal to the report.

The action of the grand jury is set aside and the report directed to be submitted to another grand jury.

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In re Bridge Over White Clay Creek.

The county commissioners have no authority to allow the contractor for the erection of a county bridge a sum exceeding the contract price, for more substantial work than that called for by the specifications and for additions of advantage to the bridge, where no contract has been made for such improvements and additions, and they are not made by direction of the commissioners, but are the voluntary act of the contractor.

Where deviations from or alterations in the plan contracted for have been made by direction of the county commissioners, and the commissioners and builders have not and can not agree upon the compensation to be made therefor, the value thereof may be recovered in an action at law.

H. H. Gilkyson, Esq., for contractor.

A. P. Reid, Esq., for county.

The facts appear in the opinion of the court delivered November 7, 1887, by Futhey, P. J.

A bridge over White Clay creek, in New Garden township, Chester county, was, after the usual proceedings under the acts of Assembly, entered on record as a county bridge. The county commissioners procured an estimate of the cost thereof, amounting to $7,848.97, and entered into a contract with John Denithorne & Son for the building of the same for that sum. After the erection of the bridge, on petition of the commissioners, inspectors were appointed by the court, who have made report that they approve of the workmanship and material in every particular, and that the contract has been fully complied with. They further report that many of the parts of the bridge are made heavier and more substantial than the specifications call for, and that important additions have been made which are of great advantage to the bridge, and which add to its strength, and they recommend that in addition to the contract price the contractor be paid for the extra iron used, amounting in value to $292.67. This extra material was added and work done, as we understand, without any arrangement or agreement with the commissioners or any direction from them, but solely by the contractor to make a better job.

We can not direct the commissioners to pay this additional sum of money. The act of 1836, in relation to county bridges, provides that "whenever a bridge shall be authorized and recorded as a county bridge, it shall be the duty of the commissioners to procure an estimate of the cost thereof, and provide in the county levies the moneys

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necessary to defray the same, and proceed to have such bridge erected by contract or otherwise, as shall seem to them expedient." The act further provides for an inspection of the bridge after its erection, and if found to be deficient that the inspectors shall report in what respect it is so, and what amount ought to be deducted from the sum stipulated in the contract; and thereupon proceedings shall be had, as is directed, for the ascertainment of the facts. Under this act it is held in Lehigh County vs. Kleckner, 5 W. & S., 181, decided in 1843, that the commissioners in erecting a county bridge must build it according to the estimate which they are thus directed by law to procure, and that they may build it either by contract or under their own immediate superintendence; but that they can not exceed the estimate, and that if there is a change in the original plan there must be a new estimate, and that there can be no recovery from the county for an amount exceeding the estimate.

In 1848, subsequent to this decision, an act of Assembly was passed (Purdon, 11th ed., page 1507, pl. 83) which provides that "in all cases where bridges shall have been or may be erected for a county, and deviations from or alterations in the plan contracted for have been made by direction of the county commissioners, where the county commissioners and builder can not agree upon the compensation to be made therefor, it shall and may be lawful for such builder to recover any sum to which he may be justly entitled for such deviations and alterations, beyond the contract price, in an action for work, labor and service done and performed, and materials found and provided."

Under this act deviations from and alterations in the plan contracted for may be made by direction of the commissioners, and their value beyond the contract price, and it would seem beyond the original estimate, paid from the county funds.

In the case before us the alterations and additions to the bridge, although doubtless beneficial, were not, as we understand, made by direction of the commissioners, and therefore there can be no recovery for their value. The commissioners have no authority, even if willing, to pay therefor from the county funds, and we have no authority to direct or authorize them to do so.

The report of the inspectors finding the bridge to have been properly erected is approved, but we decline to direct the payment of any sum above the contract price.

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Orphans' Court of Lancaster County.

ESTATE OF HENRY GOCHNAUER, DEC'D.

If one hires at an agreed price, for a certain time, and continues in the same employment after the expiration of the term without any new agreement, the presumption is that it is understood that the original rate of compensation was to be continued. But if the nature of the services be greatly changed from that which the parties had in view when the hiring took place, compensation can be recovered on a *quantum meruit*.

Facts found by an auditor must be regarded as established.

EXCEPTIONS to auditor's report.

William D. Weaver, Esq., for exceptions.

A. S. Hershey, Esq., for estate.

The opinion of the court was delivered April 21, 1888, by PATTERSON, J.

The chief exception to the auditor's report is: "The auditor erred in allowing Mary Shertzer eight hundred and fifty-five dollars ($855) for extra services."

Further exceptions are:

1. "Auditor erred in awarding only $855 to Mary Shertzer, claimant, for services rendered to and for decedent, and proven by testimony."

2. "Auditor erred in not awarding claim of Mary Shertzer as presented."

We have read the testimony submitted to the auditor and his findings of the facts, and are of the opinion that they are consistent with the proofs. Facts found by the auditor must be regarded as established: Mellon's Appeal, 32 Penna. St. R., 121.

He finds that the character of the services rendered by claimant when she came into service at five dollars per month, greatly

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changed as her aged employer advanced in years, and that after October 22, 1885, when he had a serious fall, from the effects of which he never fully recovered, she no doubt performed many disagreeable services for decedent, and that she faithfully and conscientiously attended to her duties. The testimony clearly shows great change of the character of the services, and under that finding the learned auditor was right in allowing compensation for those services upon a *quantum meruit.* Such allowance is in perfect accord with the rule in Ranck vs. Albright, 12 Casey, 367, quoted by the auditor.

That case says: "If one hires at an agreed price, for a certain time, and continues in the same employment after the expiration of the term without any new agreement, the presumption is that the original rate of compensation was to be continued."

"Continuing in the same employment," etc. In the case before us the character of the employment or services did not continue the same latterly as at first under the special agreement. The only exception we could take to the auditor's allowance, we think, would be to its inadequacy. We must, therefore, dismiss the "chief exception." We must be guided by the auditor's finding, and therefore overrule and dismiss the other two exceptions and confirm the report.

Report absolutely confirmed.

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Supreme Court of Pennsylvania.

POTTS VS. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD CO.

Damages were recovered against the railroad company for taking plaintiffs' property adjoining the railroad in Norristown, but plaintiffs could not recover from the railroad company for the interference thus occasioned with the use of other property situated at other points, and not adjoining the property taken.

ERROR to the Court of Common Pleas of Montgomery county.

This case was tried in the court below before his Honor, Judge SWARTZ.

Charles Hunsicker and *G. R. Fox, Esqs.*, for plaintiffs in error.

Charles H. Stinson, Esq., for defendant in error.

The opinion of the Supreme Court was delivered March 19, 1888, by MR. JUSTICE CLARK.

The plaintiffs, E. Channing Potts & Brother, were in the year 1883 engaged in the business of quarrying, sawing and selling marble, etc. Their quarry was located on a tract of land in the township of Whitemarsh, Montgomery county, consisting of about one hundred acres. The product of the quarry was transported in wagons to a siding of the Philadelphia and Reading railroad at Spring Mill (a mile or more distant from the quarry), where they had a lot of land of about four acres, which they used for storage and for loading and shipping on the Philadelphia and Reading railroad to their sales-yard or depot and business place at Ninth and Thompson streets, in the city of Philadelphia. The Spring Mill lot and the yard at Ninth and Thompson streets were the individual property of E. Channing Potts. The quarry was owned by E. Channing Potts and W. W. Potts as tenants in common, whilst E. Channing Potts & Brother were in the possession and enjoyment of all these several properties, to wit, the quarry, the shipping lot and the marble yard, as lessees from year to year, and copartners, conducting the general business of preparing, transporting and selling the products of the quarry. We have, therefore, three distinct claims for compensation: First, that of E. Channing Potts, the owner in reversion of the fee in the Spring Mill and Philadelphia properties; second, that of E. Channing Potts and W. W. Potts, tenants in common of the quarry; and

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third, that of the firm of E. Channing Potts & Brother, lessees from year to year of the three properties combined.

The Pennsylvania Schuylkill Valley Railroad Company located their road on the Spring Mill lot, appropriating one-half acre more or less of the land. Their road ran parallel with the Philadelphia and Reading railroad between that road and the quarry, the grade line of the former being about two and a half feet above that of the latter, cutting off the switch and siding connections which plaintiffs had with the Philadelphia and Reading railroad. The plaintiffs' contention is that their partnership business has thereby been broken up and ruined; that the market value not only of the Spring Mill lot but of the quarry and marble yard has been greatly impaired and depreciated in the hands of the lessees, and also of the respective owners thereof; that the three properties, although not contiguous, were used as one; that the destruction of the siding and shipping facilities at Spring Mill was an injury to the quarry and also to the sales-yard; and that damages, both direct and consequential, must be awarded to the several plaintiffs in this proceeding, according to their respective injuries and interests.

The court instructed the jury, in substance, that in the assessment of damages they were confined to the Spring Mill property; that the sales-yard in Philadelphia and the quarry in Whitemarsh were disconnected and distinct properties from the shipping lot at Spring Mill; and that the owners and lessees thereof suffered no injury from the construction of the railroad which could be redressed in this form of proceeding. And in this we think the court was correct.

No case has been called to our attention which rules, explicitly and arbitrarily, that several pieces of real property, not contiguous, can not for that reason, under any circumstances, be considered as one property. The general rule, however, undoubtedly is that disconnected properties are to be treated as distinct properties, and damages for right of way will ordinarily be assessed on this principle. Where a person resides upon a number of contiguous town lots, but uses all of them together as his homestead, as if the whole constituted but a single enclosure, and a railroad company appropriates a portion of only one of the lots, the damages will doubtless be assessed for the injury done to the whole property. So if one buy a farm in separate contiguous portions from different persons,

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but occupies the whole in a body for farm purposes as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces will be assessed upon the injury done to the whole tract. Peculiar and isolated cases may perhaps exist also, where although the lands are not in fact contiguous, yet the uses to which they are applied respectively are in their nature so intimate and dependent, one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together; for example, the land upon which a water-mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing, the ground covered by the reservoir, so that the latter will be regarded as part and parcel of the former, although they are not contiguous. But we do not regard the case as coming within the general exception stated. The quarry was a distinct and disconnected property from the Spring Mill lot; it was devoted to a wholly different purpose. And the same may be said of the sales-yard at Ninth and Thompson streets. The first was a quarry, used for quarry purposes alone, and the product was delivered at Spring Mill over the public wagon road; the second was a shipping point, having no connection with the quarry by contact of the lines, by railway, or any other private means of transportation; and the yard at Ninth and Thompson streets was a sales-yard, accessible by the Philadelphia and Reading railroad. Thus they were each disconnected from the others, and each was used for a distinct and separate purpose.

They were not only different properties, applied to different uses, but the fee was held and owned by different persons; neither of them could be considered as appurtenant to or part and parcel of the other. There was no special reason, outside of the conveniences and appliances existing at Spring Mill, why the marble should be shipped from that point; and for these appliances the plaintiffs were entitled to be paid. The quarry might be successfully operated without the property at Spring Mill. The railroad was accessible at other points, and for aught that appears, or was offered to be shown, equally available. Shipping facilities might be supplied elsewhere. If the company had appropriated a part of the sales-yard in Philadelphia, could it be pretended that damages would accrue for supposed injuries to the properties in Montgomery county? If the contention of plaintiffs in error be correct, that the three properties are to be regarded

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as one, this result must certainly ensue; but there was no commanding necessity that the marble product of the quarry should be sold at Ninth and Thompson streets. If that yard was especially valuable for the purpose, compensation commensurate to the injury would be made, and some other market place could be provided.

An extensive business partnership may conduct a variety of operations, as distinct in their character as the vocation of its various departments; and if their different and disconnected properties are to be regarded as one property, because they are used in one business, the assessment of damages for right of way would become liable to such complications as would greatly embarrass the administration of the law in this form of proceeding.

In order that two properties having no physical connection may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other.

It is perfectly plain that apart from the alleged connected use to which the three several properties have hitherto been applied the plaintiffs could have no claim arising out of the construction of the road for any supposed consequential injury, either to the quarry or to the sales-yard; the railroad did not touch either of them, or any right or easement appurtenant thereto, and there is nothing upon which an action at the common law could be sustained in such a case.

It did the plaintiffs no harm, therefore, that they were denied the privilege of proving that these properties were used as stated in the offer. In the consideration of the case we assume all that was offered to be proved. We are of opinion that the plaintiffs were not entitled to damages, direct or consequential, for any supposed injury either to the quarry or to the yard at Ninth and Thompson streets.

Judgment affirmed.

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Court of Common Pleas of Luzerne County.

COMMONWEALTH EX REL. VS. SCHOOLEY ET AL.

If an attorney entrusted with the general management of a case intentionally and in the exercise of his best judgment omits to file exceptions to a referee's report, and judgment is entered thereon, the court will not, upon the subsequent application of the client, open the judgment and permit him to file exceptions, although the attorney did not inform him that exceptions must be filed within a certain time.

An acceptance of notice of the filing of a referee's report is within the general powers of an attorney-at-law and will bind his client.

RULE to show cause why petitioners should not be allowed to file exceptions to the reports of the referee, *nunc pro tunc*.

The opinion of the court was delivered March 12, 1888, by RICE, P. J.

These cases were duly referred to William S. McLean, Esq., under the act of April 6, 1869, and its supplements. He completed his reports December 21, 1887, and filed the same on January 3, 1888. Annexed to each of said reports is a notice and acceptance of service thereof in the following form:

"To Messrs. Lenahan and Bohan, attorneys for plaintiffs, and Harding and Atherton, attorneys for defendants:

"Take notice that the foregoing report will be filed in the office of the Prothonotary of Luzerne county on January 3, 1888; in the meantime the same will be in my office, where you can examine and except to the same if you see fit.

[Signed] "WILLIAM S. MCLEAN, Referee."

Service accepted of above notice.

Lenahan and Bohan for plaintiffs.

Thos. H. Atherton for heirs of J. B. Schooley.

Garrick M. Harding, per J. S. Harding, for other defendants.

No exceptions were filed by any of the defendants, and judgments having been entered on the reports and executions issued, this rule was applied for and granted on February 2, 1888.

I. Assuming for a moment that the notice of the filing of the report was regular, the question arises whether the court would be justified in the exercise of its discretionary powers in setting aside

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the judgment and permitting the above named defendants, or any of them, to file exceptions now. Notwithstanding the extreme liberality of the courts in opening defaults in order to prevent injustice, even in cases where such default is due to the carelessness, forgetfulness, or mistake or oversight of attorneys, we are clearly of opinion that this case does not come within any of the principles upon which that power is exercised; and a single quotation from the testimony of Mr. Slocum will suffice to show the ground of our decision upon this branch of the case. He says: "I first learned that Mr. McLean had made up his report in these cases some time last December [before the time for filing exceptions had expired]. I happened over to Pittston one day and met George Smith [another defendant]. He took some figures out of his pocket and told me that that was the finding of Mr. McLean, as Mr. Atherton had told him. He said Judge Harding recommended us to pay it." Neither Judge Harding nor Mr. Smith was called to testify, and, therefore, we may safely take the above statement as fairly disclosing the reason why the defendants' counsel did not file exceptions. It was not because of any mere oversight or mistake of fact on his part, but because, in his judgment, the reports should not be excepted to.

Concede, for the purposes of the discussion, all that is now claimed, viz., that there were fair grounds for excepting to the reports, that the judgment of the attorney was erroneous, and that he did not inform his clients that exceptions must be filed within ten days, these are matters between him and them and are not grounds for reopening the cases. If an attorney entrusted with the general management of a case, but under no special instructions to take any particular course, should intentionally and in the exercise of his best judgment omit to except to an auditor's report, or to the charge of the court, or to the admission or rejection of evidence, or to move for a new trial, or the like, it is very clear that the client would not be entitled to have the court relieve him from the consequences of the omission, even though the attorney did not inform his client of the time within which the act must be done; and we do not think the grounds upon which we are asked to interfere here are any more tenable. If the attorney had been instructed to except to the reports and had by mere oversight failed to do so, or if the filing of exceptions had required the personal intervention of his clients and

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he had failed to inform them of the time within which they must file them, a different question would be presented.

II. The supplement to the act of 1869 (act of June 28, 1871, P. L. 1364) provides as follows: "And in order to give all parties in interest an opportunity of entering exceptions to findings of fact or law and to the admission or rejection of evidence, etc., no referee shall file his report until ten days after he has notified the parties of his intention so to do on a day designated, and giving them an opportunity of having access to such report." Since the passage of this act it has been the uniform practice for the attorneys of the respective parties to suits tried before referees to accept service of notice of the filing precisely as was done in this case, and so far as we know the regularity of this mode of procedure has not heretofore been questioned. On the contrary, it was recognized by us in the case of Wilson vs. Morrison, 1 Kulp, 67, although it is fair to say that the question in that case was not as to the sufficiency of notice to the attorney but as to the proof of service upon any one. The defendants' counsel earnestly contends that, notwithstanding such has been the practice, the requirements of the statute can only be satisfied by personal notice served on the party. We agree with him that practice can not change the statute law; but when the practice under an act of Assembly has become so well established, it is to some extent evincive of the construction put upon the act by the legal profession, and is, therefore, worthy of consideration upon that question. Especially is this so when the effect of holding, as the defendants' counsel contends, contrary to the uniform and well established practice would cast a cloud on almost numberless judgments entered on reports of referees having no other proof of notice to support them than appears in these cases. But, aside from these considerations, the statute is entirely silent as to the form of notice, whether in writing or not, and as to the mode of service, and makes no provision whatever for service upon non-residents.

These omissions are significant, for if the Legislature had intended to require personal service of notice on the party it seems scarcely conceivable that they would omit to prescribe the mode of making such service. In this respect the case differs materially from the decisions under the compulsory arbitration law relied on by the defendants' counsel. There the mode of service is pointed out, and

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is only to be made on the attorney when the party resides out of the county, thus leaving no room for supposing that a service could be made on the attorney in all cases. That the authority of an attorney-at-law is more extensive in Pennsylvania than in England and other countries is recognized by numerous cases: Hageman vs. Salisberry, 24 Sm., 280; 1 T. & H. Pr., Sec. 224. "He is an officer or member of a court of record and appointed in the place of another to transact and manage either his law concerns and the business incident thereto, or other affairs which require the professional skill, knowledge or learning usually possessed by members of the profession; * * * and indeed it would be difficult to point out any matter or thing in the legitimate conduct of a suit to judgment which he may not do. The limitations imposed on him relate generally to compromises, which substitute one thing for another, as real estate for money, or to transactions after judgment": Wilson vs. Young, 9 Barr, 102. The old rule may be now considered to be virtually reaffirmed, that even where a rule of court directs notice to be served on a party, service on the attorney is sufficient where the attorney, on receiving notice, makes no objection: 1 T. & H. Pr., Sec. 1473. Notices to attorneys of a rule to take depositions (Newlin vs. Newlin, 8 S. & R., 41), to justify bail before a justice of the peace (Cummings vs. Forsman, 9 Barr, 194), of the filing of a referee's report (Dunkan vs. Calbraith, 1 P. A. Browne, 15), have all been held sufficient to affect the client with notice. Upon an examination of the cases upon the powers of attorneys in the management of civil suits, most of which are collected in 1 T. & H. Pr., Sec. 224, it will be found that many acts of far greater importance than that brought in question here have been sustained. And although no decision of the Supreme Court construing a statutory provision precisely like that under consideration has come to our notice, we are clearly of opinion that, upon principle, an acceptance of notice of the filing of a referee's report is within the general powers of an attorney-at-law, and is sufficient to bind his client.

Therefore, this rule is discharged.

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5 Kulp, 53.

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Court of Common Pleas of Montgomery County.

JOSEPH H. OBERHOLTZER VS. ANNA HUNSBERGER, ADM'X.

A common law action does not lie to recover damages for a failure to enter satisfaction of a judgment after payment.
The provisions of the act of April 13, 1791, provide a penalty and regulate the remedy.

DEMURRER to action in trespass.

George N. Corson, Esq., for plaintiff.

Bichel & Hobson, Esqs., for defendant.

The facts of the case fully appear in the opinion of the court delivered June 4, 1888, by WEAND, J.

This case comes before us on a demurrer to plaintiff's declaration, and was argued by counsel for plaintiff and defendant.

The suit is in trespass to recover damages for failure to enter satisfaction of a judgment after payment.

It is conceded by plaintiff's counsel that it is a common law action and not brought under the provisions of the act of April 13, 1791, Sec. 14, Pur. Dig. 951, which provides a penalty for a refusal to enter satisfaction.

The act of March 21, 1806, Sec. 13, 4 Sm., 332, Pur. Dig. 74, Sec. 5, provides that: "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of Assembly of this commonwealth, the directions of said act shall be strictly pursued; and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect." This suit, therefore, is in clear violation of the act, and can not be maintained.

The demurrer was filed January 27, 1888, at which time the arbitrators had not yet been chosen; the case, therefore, was not out of court. Hoffman vs. Locke, 19 Penna. St. R., 57.

And now, June 4, 1888, judgment is entered in favor of the defendant on the demurrer.

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JOHN D. HART vs. WILLIAM C. HAMILTON & SON.

Where by special agreement an arbitrator is appointed whose decision shall be final and conclusive, his award will not be set aside for failure to consider certain items of damages.

Pleas that are mere statements of evidence are properly rejected by the court; the facts therein contained may be given in evidence under the general issue.

An omission to compel the perfecting of the pleadings beforehand is a tacit agreement to waive matters of form and to try the cause on its merits.

SUR motion for new trial by defendant.

G. R. Fox & Son, Esqs., for motion.

Charles Hunsicker and *B. E. Chain, Esqs.*, contra.

The facts of the case fully appear from the opinion of the court delivered June 4, 1888, by SWARTZ, P. J.

This suit was brought on May 17, 1886, to recover the sum of six thousand three hundred and twenty-two and fifty-six-hundredths dollars, the amount awarded the plaintiff by A. Penrose Benner, the chosen arbitrator of the parties under a contract for the erection, extension and repair of certain buildings. The agreement between the plaintiff and defendants provided *inter alia* as follows: "If the said Hart and the said Hamilton & Son are unable to agree as to such cost, whether as an addition or deduction, said cost shall be determined by said architect, whose decision on all points affecting this agreement and the alterations thereof, or under such alterations, shall be final and conclusive on both parties."

The plaintiff declared upon the award made under this contract or agreement, made profert of the agreement, and filed a copy of the award and agreement at the same time the declaration was filed.

After an unsuccessful effort to secure judgment for want of a sufficient affidavit of defence, the plaintiff on November 15, 1886, entered a rule to plead, and on December 4, 1886, the defendants, without demanding *oyer*, pleaded "payment with leave, etc.," "nil debent," and "no award." The Prothonotary under the rules of this court entered the replications and put the cause at issue.

On December 10, 1886, and on January 15, 1887, the defendants filed in the Prothonotary's office special pleas setting forth that the suit ought not to be maintained on the award, because the plaintiff had repudiated it, because the award was not final, and because the plaintiff had not presented a proper release of liens. On motion of the plaintiff these special pleas were stricken off. We then de-

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cided that the matters pleaded therein could be given in evidence under the issue already framed. We failed to see any good reason for sustaining these pleas. To suffer them to stand would necessarily delay the cause and complicate the proceedings. Upon the trial of the case the facts alleged in the special pleas were as fully considered by the court as if specially pleaded. Not a particle of evidence was excluded that would have been admitted under the special pleas. These pleas were mere statements of *evidence*, and as such were properly rejected: Stephens on Pleading, 312. The statements were admissible under the plea of *nil debent:* Saunders on Pleading, Vol. I, page 181.

The testimony embodied in these special pleas was no bar to this action. That the plaintiff repudiated the award is immaterial. He was bound by it and could not repudiate it. It was the award of the tribunal created by the parties themselves. Even if he did at one time repudiate it, he changed his mind and was willing to accept and abide by it.

The failure to consider certain items of damage because the arbitrator was of the opinion they were not within the submission, does not vitiate the findings of the arbitrator as a final award. Mr. Benner was the judge of the law and the facts. Conner vs. Simpson, 104 Penna., 440. He decided that these items were not within the agreement or contract; it was therefore his duty to exclude them irrespective of the wishes of the parties. If he found they were not within the submission he had no right to consider them. If he is not the judge to determine what matters are within the submission, who is? Surely not the parties, for then either party may defeat the reference; and to ask the courts to determine what matters come within this building contract is to defeat the very purpose of the parties, namely, to keep out of the courts. He decided that these matters must be excluded because not within the agreement, and the parties are estopped from alleging that they are within the reference. The matters are, therefore, distinct, independent and foreign to the award; but the defendants may, as was ruled upon the trial, set off these damages against the award, because the plaintiff is estopped from saying they are not independent matters.

That a lien was filed by the plaintiff can not defeat his action; he had a right to protect himself, and the defendants can obtain relief at all times by paying the award. This satisfies the lien. The

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plea that no proper release of liens was tendered is immaterial without an allegation that liens other than that of defendant are maintained. This suit was brought in May, 1886, and lapse of time furnished the defendants the best of all releases.

What was said in Davis vs. Stuard, 99 Penna., 299, applies in this case. The court after issue joined refused to entertain a special plea. Justice Trunkey, sustaining the lower court, said: "It was not error to overrule the defendant's motion for leave to file the special plea." "That testimony embodied in a plea would be no bar to this action. Under the general issue the defendant had the right to prove the facts set out in the plea." The special pleas in this case were in no better position because actually filed. It does not appear that they were entered with notice to the other party or by leave of court. There was no court in session when the plea of January 15, 1887, was filed. The case stands as upon an application to file the pleas under objection by the plaintiff.

After the case is ready for trial on the general issue special pleas may be disallowed when the allegations can be given in evidence under the general issue; especially is this so when no cause is shown for such allowance: McBride vs. Duncan, 1 Wharton, 273; Union Ins. Co. vs. Murphy, 17 W. N. C., 243; Davis vs. Stuard, 99 Penna., 299; Biddle vs. Phila. & Reading R. R. Co., 13 W. N. C., 467; Bixnlaum vs. Passenger Conductor Co., 15 W. N. C., 518.

The Prothonotary entered a replication to the plea of "no award." If this was not sufficient the defendant could have demurred to it or he was entitled to set it out truly in his rejoinder. Morse on Arbitration and Award, 593.

But suppose the replication was improper, "an omission to compel the opposite party to perfect the pleadings beforehand is a tacit agreement to waive matters of form and try the cause on the merits." Lewisburg Railroad vs. Stees, 77 Penna., 337.

The words "and issue" on the docket suffice to cure any defect of form in joining issue. Carl vs. Commonwealth, 9 S. & R., 63.

The only other matter complained of is embraced in the fifth reason, but as there is no testimony to sustain the allegations we can not consider it. There was no sealed verdict.

And now, June 4, 1888, the motion in arrest of judgment is overruled and the reasons are dismissed.

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ADMINISTRATORS OF THE ESTATE OF JACOB M. COWDEN VS. JOHN MCCLELLAND.

Where assignee of judgment fails to enter his assignment on the record, the defendant without notice of the assignment is justified in paying the moneys due on the judgment to the plaintiff of record.

One judgment may be set off against another, but a debt or claim not in judgment can not be so set off.

A claim due to a third person can not be used by the defendant as a set off against the judgment debt.

RULE to open judgment and stay execution.

Larzelere & Gibson, Esqs., for rule.

Henry Freedley, Esq., contra.

The facts of the case sufficiently appear from the opinion of the court, delivered June 4, 1888, by WEAND, J.

Jacob M. Cowden in his life-time held a judgment for $400 against John McClelland, entered of record August 5, 1884, in Judgment Docket, I, page 571. Cowden assigned the judgment to one P. J. Kelly, but the assignment was not entered of record until April 29, 1887.

On September 25, 1885, McClelland paid Cowden the full amount of judgment and interest, and the latter agreed to enter satisfaction of record. At that time there was nothing to indicate that Cowden had parted with any interest in the judgment. Afterwards, in 1886 and 1887, McClelland gave Cowden two other judgments for $100 each, both entered of record May 10, 1887. Execution has been issued on one of these judgments. Cowden never paid Kelly the principal of the $400 judgment, but continued to pay him interest until his death. Kelly not knowing that the judgment had been paid by McClelland now demands payment of the same from him, and the latter asks us to open the two judgments held against him by Cowden's estate so that he may offset against them the $400 paid on the Kelly judgment.

The first question that arises is "Was the payment to Cowden a proper one under the circumstances so as to relieve the defendant from any further claim thereon? If it was Kelly can have no right to enforce payment of it again as against McClelland, and the latter will have no claim against Cowden. At the time of payment the record did not disclose any assignment or transfer of the judgment,

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nor is there anything to show notice of such fact to McClelland. Judged by the record, therefore, Cowden was the legal owner entitled to receive the money, and if any one must lose, it must be Kelly, for his neglect in not entering the assignment or notifying the defendant in the judgment. The contest here is between Cowden and McClelland, and we are not called upon to adjudicate any claim which Kelly may have against McClelland. If he can show notice to the debtor, the payment was not proper, as was ruled in Guthrie vs. Bashline, 25 Pa. St. Rep., 80. From the facts disclosed in the petition and answer, we are of opinion that McClelland was fully justified in treating Cowden as the proper person to receive the money and that the judgment was fully paid and that McClelland could successfully contest the claim made by Kelly: Henry vs. Brothers, 48 Pa. St. Rep., 70; Gaullagher vs. Caldwell, 22 Pa. St. Rep., 300. As against Kelly, however, McClelland is not willing to take advantage of this condition of affairs and admits that his land is liable to Kelly on the judgment, the effect of which would be to give him a right of action against Cowden to recover back the $400, instead of compelling Kelly to do so. Now if Cowden was still alive this claim could not be used as a set-off against the judgments as was decided in Thorp vs. Wegefarth, 56 Pa. St. Rep., 82, where Judge Agnew held that to a judgment there can be no set-off of a debt not in judgment. One judgment may be set off against another judgment through the equitable powers of the court, but to a judgment ripe for execution there can be but one answer, to wit, payment pure and simple. There is no such thing as a right to tender a mere chose in action in payment of a judgment or execution. The debts are not of the same quality and the right to recover the chose has not been judicially determined which must precede a legal right to use it as payment or set-off to a judgment."

In Beaty vs. Bordwell, 10 Norris, 438, Judge Mercur said, "No court would open a judgment merely on proof that the defendant had an account against the plaintiff equal to the amount of the judgment."

Does the death of Cowden change the legal aspect of the case? It certainly would not if Cowden's judgments were due before his death, but they both became due afterwards, as did also McClelland's right against Cowden by virtue of his assumption of the Kelly judgment, which did not take place until after the death

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of Cowden. If Kelly is to bear the loss he will only get a *pro rata* dividend from Cowden's estate, which is said to be insolvent, whereas if we allow McClelland to interpose the claim he will be paid in full to the extent of the two judgments.

This can not be done if it will interfere with the rights of other creditors of the decedent or alter the regular course of distribution. It may be that if Cowden had been debtor originally to McClelland, that the latter could off-set his claim against that of the former, both coming due after the death of Cowden, but we think he can not by his voluntary assumption of a debt, from which the law had released him, be placed in this position.

The rights of creditors were fixed at the moment of Cowden's death when McClelland was released from liability on the $400 judgment and Kelly became Cowden's creditor. No arrangement between the parties made afterwards could affect the rights of other creditors, and although it may appear hard on the debtor to require him to pay the judgments and thus lose $400, we must remember that he has placed himself in this position by agreeing to pay a debt from which the law had released him.

His claim to set-off can also be resisted upon the ground that a defendant can not use a claim due to a third person as a set-off, Longafel vs. Bartshe, 3 P. & W., 492, and that the defendant must show that at the time of suit brought he was the owner of the claim which he seeks to use as a set-off. Hiling vs. Hugg, 1 W. & H., 418. Stewart vs. U. S. Ins. Co., 9 Watts, 126.

We think the judgments ought not to be opened.

And now, June 4, 1888, rules discharged.

JACOB M. COWDEN, TO USE OF PATRICK J. KELLY, VS. JOHN McCLELLAND.

Creditors are not included by the terms of the act of March 14, 1876, and therefore have no standing to invoke its provisions to enforce satisfaction of a judgment.

FIERI FACIAS. Rule on application of John Hobensack, a mortgage creditor, to stay execution and strike off judgment.

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Cowden, to use, etc, vs. McClelland.

D. O. Rogers, Esq., for rule.

Larzelere & Gibson, Esqs, contra.

John Hobensack purchased from Jacob M. Cowden a mortgage given by said John McClelland to said Cowden for $1000; at the same time Cowden held a judgment against said McClelland for $400, which was a lien prior to said mortgage, and Cowden subsequently sold the same to Patrick J. Kelly, who issued the above execution. Hobensack contends that the agreement and understanding with Cowden, at the time he purchased the mortgage, was that the judgment should be paid and satisfied. This was not done, and now he asks that the court shall direct satisfaction of said judgment.

The opinion of the court was delivered June 4, 1888, by WEAND, J.

As we read the case of Heidelbaugh vs. Thomas, 10 W. N. C., 141, the petitioner in this case is not "a person concerned in interest," contemplated by the act of March 14, 1876, Sec. 1, P. L. 7. The court said "if the legislature had intended to include creditors they would have said so in express terms." Now whilst a mortgagee may in a certain sense be considered a purchaser, yet in construing a law which provides a summary proceeding, such as is invoked in this case, we must treat the mortgage merely as a debt and the mortgagee a creditor. Conceding that Hobensack, the owner of the mortgage, has a right to be protected as against the prior judgment, yet, when the defendant, notwithstanding the payment to Cowden, is willing to still treat Kelly as his judgment creditor, we have no right to satisfy the judgment even although it may be paid as to other lien creditors. Kelly now wishes to sell the real estate on his lien, and to this McClelland does not object. If the fund realized from the sale is more than enough to pay Hobensack, if he prevails against Kelly, then the latter has a claim on the balance. It becomes a mere question of distribution, and all questions touching the payment of the prior judgment may be there raised and determined.

And now, June 4, 1888, the rule is discharged.

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In re Assigned Estate of Elias Fillman.

Borough taxes, having been a lien on real estate by special act of Assembly, were properly paid by the assignee in trust for creditors.
Compensation of trustee depends upon the nature, character and extent of the services rendered rather than upon any rate per centum on any particular sum.
The fees of counsel for assignee should be the ordinary fees paid for similar services.

Sur exceptions to auditor's report.

E. L. Hallman and *E. F. Slough, Esqs.*, for exceptions.

William F. Solly, Esq., contra.

The facts of the case sufficiently appear from the opinion of the court delivered June 4, 1888, by Swartz, P. J.

The exceptants object to the allowance of taxes paid by the assignee, the commissions of the assignee, and the fees of counsel.

The taxes paid amounted to seven hundred and twenty-nine and twenty-eight-hundredths dollars. Of this sum four hundred and fifty-seven and twenty-hundredths dollars were due on Norristown borough taxes for 1884, 1885 and 1886. By the act of Assembly of March 8, 1856, P. L. 104, these borough taxes "shall be a lien on the real estate upon which they are assessed, and shall be paid in preference to any subsequent encumbrance on such property." The money realized from the sale of the real estate was more than enough to pay the encumbrances, including these borough taxes. These taxes were properly paid by the assignee.

But aside from this act the payment of these and the other taxes is sustained by the findings of the auditor. He says: "All of the tax collectors could have levied upon sufficient personal property to pay the amount of taxes charged against the assignor, and to prevent a levy and sale of the personal goods the assignee rightly paid the taxes." It does not clearly appear how this was shown before the auditor, but the finding of fact was not attacked, and we assume that the testimony, perhaps not fully taken down, justified the finding. The auditor properly allowed the credit taken for the taxes under his findings of facts. Wright vs. Wigton, 84 Penna., 163; Osborne's Estate, 5 Wh., 266.

The assignee sold the real estate clear of encumbrances without obtaining an order of court. This was done by an arrangement made with all the lien creditors. The liens were mainly mortgages, and these could not be divested except by agreement of the holders. The assignee secured good prices and administered the trust care-

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fully and discreetly. Experience proves that sales of realty clear of all liens realize the best figures. If the properties had been sold by the Sheriff it is doubtful whether the unsecured creditors could have realized anything on their claims. The collection fees in the mortgages and Sheriff's costs would have exhausted the small margins.

That the sales as made were prejudicial to the estate can not be assumed in the absence of any testimony alleging it: Shunk's Appeal, 2 Penna., 309. The case just cited sustains the auditor fully in the allowance of two and one-half per centum commissions on the whole amount realized by the assignee in his sales. There the assignee sold under similar circumstances, under a like arrangement with the lien creditors. He was allowed compensation at the rate of two and one-half per cent. on the sum realized at the sales, and this too when less than one-third of the proceeds passed through his hands; some of the liens were allowed to remain, and credited as payments to the purchasers. The question is one of compensation, and depends upon the nature, character and extent of the services rendered rather than upon any rate of per centum on any particular sum. We can not say that the auditor erred in fixing the compensation of the assignee at $800.

We examined with great care the evidence taken before the auditor relating to counsel fees allowed in the account, for the purpose of ascertaining the nature, character and extent of the services rendered by counsel.

The assignee had no litigation in collecting the assets of the estate, and the creditors seem to have been in entire harmony with him in his efforts to convert this property into cash. There was no personal property other than that taken by the assignor under his exemption. There was some rent due, but no legal process was used in collecting it. The services required of counsel seem to us but the usual and ordinary services rendered as incident to assigned estates. The counsel should be paid the ordinary fees paid for similar services. We know of no other standard; and, judged by it, we are convinced that the fee should be reduced to $350. The testimony indicates that the counsel of the assignee rendered some services to the estate that were due from the assignee himself; but this is no reason why the creditors should pay them.

And now, June 4, 1888, the report is referred back to the auditor to redistribute in accordance with this opinion.

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WILLIAM H. MCNEILL vs. JACOB L. REX ET UX.
GEORGE G. MCNEILL TO USE, ETC., vs. JACOB L. REX ET UX.

In case of a defective appeal from the judgment of a justice of the peace the party in default should be called on to perfect his appeal before it be dismissed.

RULES to strike off appeals of defendants from judgments of justice of the peace.

Freas Styer, Esq., for rule.

Charles Hunsicker, Esq., contra.

These cases were suits by plaintiffs before A. S. Hallman, a justice of the peace, for wages due for manual labor done on the farm of defendants. Judgments were entered in favor of plaintiffs, and appeals were taken by defendants and duly entered in said court.

The plaintiffs then presented their petitions to the court praying for rules to strike off the appeals on the ground that defendants had not made the oath required by the act of Assembly of April 20, 1876, upon appeals from judgments of justices of the peace in suits for wages for manual labor, and attach the same to the transcripts filed in court. A rule was thereupon granted on petition of defendants to allow them to perfect their appeal and file the proper affidavit.

The opinion of the court in the case was delivered June 4, 1888, by WEAND, J.

The appeals in these cases are defective, as the defendants did not make the affidavit required by law. It has, however, been ruled by our own court in Perry's Appeal, 3 MONTG. L. R., 43, following Means vs. Trout, 16 S. & R., 349, and Burgess, etc., of Huntingdon vs. Jackson, 2 P. & W., 431, that the party in default should be called on to perfect his appeal within a given period, or in default thereof to have his appeal dismissed, and that the court ought not to dismiss the appeal in the first instance.

And now, June 4, 1888, the motion to quash the appeal is overruled and leave given the defendants to perfect their appeal within fifteen days from this date, and in default thereof said appeals to be dismissed.

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MICHAEL HARVEY, BY HIS NEXT FRIEND, MARY HARVEY, HIS MOTHER, VS. EDWARD QUIGLEY.

Amendment of record so that the legal plaintiff may sue in his own right will be allowed where cause of action is not changed.

MOTION to amend title of suit.

Henry A. Stevens, Esq., for plaintiff.

Henry M. Tracy, Esq., for defendant.

The facts of the case sufficiently appear from the opinion of the court delivered June 4, 1888, by SWARTZ, P. J.

By his affidavit the plaintiff has now brought himself within the rule allowing the amendment prayed for.

The mother brought suit for the use of her minor son to recover wages earned by the son. She claims that these wages belong to her, and she therefore asks leave to amend so that she may sue in her own right. To allow the amendment is not a change of the cause of action; in either case the suit is brought to recover the wages of the minor.

The Common Pleas of Luzerne allowed a similar amendment in Eustice vs. The Plymouth Coal Co., 21 W. N. C., 430. See also Butterworth to use of Jones vs. Hance, 16 W. N. C., 496.

And now June 4, 1888, the amendment is allowed.

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SAMUEL HILTNER, JR., VS. CATHARINE HILTNER.

A conveyed land to B, his son, with the understanding that it should be a home for A and his wife as long as they lived. After the death of A the son brought ejectment against the mother, who was in possession. *Held*, that the son could recover.

An express trust by parol is forbidden by the act of 1856; and as there was no fraud in taking the title, nor payment of any part of the purchase money by the defendant, there did not arise a resulting trust which would bring the case within the exception of the act.

EJECTMENT. Motion for new trial.

Geo. W. Rogers & Son, Esqs., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts of the case appear from the opinion of the court delivered June 4, 1888, by WEAND, J.

The defendant in this case is the stepmother of plaintiff, and claims a life estate in the land in dispute, arising from a trust resulting from a purchase by her husband, who had the title placed in the name of his son, the plaintiff.

The most favorable construction that can be placed upon the testimony of the defendant's witnesses is, that in 1873 Samuel Hiltner, Sr., advanced fifteen hundred dollars to his son, Samuel Hiltner, with which to buy a property, on which a house was afterwards erected with money also furnished by the father; that at the time the lot was bought the father said that it was to be a home for himself and wife as long as they lived; and that the son took the title with the understanding that he was to look after the old lady and provide for her. The father is now dead, and the son claiming the title seeks to eject the defendant. The testimony is rather vague and unsatisfactory, but for the sake of the argument I have stated it in its most favorable aspect for the defendant. It is conceded that the defendant paid no part of the purchase money, nor is there any evidence of fraud on part of plaintiff in obtaining the title.

It therefore follows that there can be no express trust in favor of the defendant, the agreement not being in writing. In Nixon's Appeal, 63 Penna. St. R., 279, Judge Sharswood thus states the law: "A trust which arises or results by implication or construction of law from payment of the purchase money of land may unquestionably be established by parol evidence; but then that evidence must be clear and unequivocal in showing that the money was paid at the

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time. A subsequent payment, however clearly proved, will not answer the requirements of the law. This is well expressed by Chancellor Kent in Bottsford vs. Barr, 2 Johns Ch. Rep., 408. If A purchases an estate with his own money, and takes the deed in the name of B, a trust results to A, because he paid the money. The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he can not be permitted to show by parol proof that the purchase was made for his benefit or on his account."

Is the plaintiff a trustee upon the principle that, although no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another, which he could not have obtained except by a confidence reposed in him, he is converted into a trustee *ex maleficio?* See Christ's Appeal, 66 Penna. St. R., 237.

In Dilts vs. Stewart, 1 Cent. Rep., 606, the father of a daughter who was married made a deed of land to the daughter's husband as grantee, saying that he intended the land as a gift to the daughter. The husband declared that the land should be his wife's, but also said that unless he got the land in his own name he did not wish it. He afterwards called the land his wife's. These facts were held not sufficient to raise a resulting trust in favor of the wife. The court say: "The grantor knew that Peter Dilts (husband) wanted the title to himself. Had Dilts persuaded and induced his father-in-law to make the deed to him by a promise to hold in trust for his wife and to convey or devise it to her, there would be some cause for holding him as a trustee *ex maleficio.*

In the case in hand there was no persuasion, promise or inducement on the part of the son made before the deed was executed, and the entire evidence fails to approach the rule which in such cases requires it to be "clear, explicit and unequivocal." The principal witness for defendant fixes the conversation in relation to the purchase of the property in 1873, 1874 and 1879; sometimes he says it was before the deed was passed, and sometimes he says it was afterwards. The most that can be said of the effect of the whole testimony is that the old gentleman made a gift to his son, relying upon him to take care of his stepmother after his (the father's) death; but I fail to find any such evidence as would establish a trust in the land itself.

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The case, in my opinion, is not as strong as that of Braden vs. Workman, 1 Cent. Rep., 598, where Boyd, the father of Mary A. Braden, purchased the property and deeded it to W. H. Braden for the use and benefit, as he stated, of his wife, Mary A. It was sold on execution against the husband and claimed by the wife. On the trial she offered to prove these facts and that W. H. Braden had paid no part of the purchase money, and also his declaration that Mary A. was the owner.

Judge Gordon, who delivered the opinion, said: "Now it is obvious that if what is here proposed to be proved had been reduced to writing at the time of the execution of the conveyance from Boyd to Braden, an express trust would have been created; but such trust in parol is just what the act of 1856 strikes down. The exception is in favor of resulting, not express trusts; trusts that by operation of law result from the actual fraud of the party taking the title, or the payment for the property with the money of the *cestui que trust.* And neither subsequent fraud nor subsequent payment can raise such a trust. But nothing of the kind appears in the above stated offers. There is no pretence that Braden committed a fraud on either his father-in-law or his wife, even in intention; and as no purchase money was paid it can not be alleged that she is, by the payment thereof, brought within the exception of the statute. The proposition involves a gift by deed to Wm. H. Braden, on which the donor attempted to engraft an express trust in parol; a trust of that kind which the statute peremptorily forbids the courts to execute."

We are of opinion, therefore, that the facts of this case would not have warranted a finding a verdict in favor of the defendant, because no trust had been shown which would bring the case within the exception to the act of 1856, and that no error was committed in directing a verdict for the plaintiff.

And now, June 4, 1888, the motion for a new trial is overruled.

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WILLIAM SANTRY VS. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY.

Where no exception is taken to the reservation by the court it is assumed that all parties acquiesced in the point reserved as a true statement of the facts in the case.

The owner of a property fronting on a highway can not recover damages for the construction of a railroad across the highway where no property, right or way appurtenant to the house and lot was taken, injured or destroyed. The injury, if any, is of the same kind suffered by all others who have occasion to use the highway.

MOTION to enter judgment for defendant *non obstante veredicto* on the reserved point.

Charles Hunsicker, Esq., for plaintiff.

Charles H. Stinson, Esq., for defendant.

The facts of the case fully appear from the opinion of the court delivered May 7, 1888, by SWARTZ, P. J.

The railway of the defendant company crosses Oak street a short distance north of Marble street. Marble street crosses Oak at right angles. The plaintiff is the owner of a small dwelling-house situate in the borough of Conshohocken, on said Oak street, about fifty feet south of Marble street. The railway cut across Oak street prevents all travel on this street north of Marble street and south of Elm, which is the next street above Marble running parallel with Marble. Forrest is the next street east of Oak, and runs parallel with Oak. The railway cut across Forrest street is spanned by a bridge. The jury found that plaintiff's property was depreciated in its market value by reason of the cut across Oak street and the increased grade over the Forrest street bridge necessitated by the railway cut across this street.

Whether there was any evidence of a fact which ought to have been submitted to the jury was a question of law reserved in the following language: "The undisputed testimony being that the damages of plaintiff are occasioned by the railroad bridge over Forrest street and the cut across Oak street, more than seventy-five feet away from the plaintiff's property on Oak street, can the plaintiff recover?"

The plaintiff contends that we can not enter judgment for the defendant on the point reserved, because the facts assumed by the court were not agreed upon by the parties. The plaintiff's narr sets forth substantially the grounds of recovery assumed in this point;

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the whole contention before the court and jury assumed this state of facts; the plaintiff disclosed these uncontradicted facts by his own witnesses; and when we assumed them in the reserved point no objection was made and no exception taken to such assumption. It is now too late to say that these are not the undisputed facts. In Insurance Co. of Penna. vs. Phœnix Insurance Co., 71 Penna. St. R., 40, Sharswood, J., says: "No exception was taken to the reservation of the court below; and, such being the case, we are bound to assume that it was assented to or acquiesced in by all parties as a true statement of the facts. Very great injustice might be done if a party not objecting at the time of the reservation should be permitted afterwards to take the ground that there was no evidence of the facts, or that they ought to have been submitted to a jury." If, however, we believed for a moment that the facts assumed were not the true facts in the case, a new trial would be granted at once.

We think the plaintiff should not recover, because the injury was one common to all persons who had occasion to use the streets of the borough of Conshohocken. The annoyance or inconvenience suffered by the plaintiff may have been much greater than that endured by others, but it was of the same kind, differing only in degree. Gold vs. City of Phila., 115 Penna St. R., 197.

All properties in the borough are made more desirable, hence more valuable, by the construction of a good, attractive street. The nearer the street the more apparent the benefit; and, on the other hand, all properties suffer more or less from a street neglected, obstructed or allowed to become very bad. But because one suffers from such neglected street more than another is no ground for an action against the municipality: Gold vs. City of Phila., *supra*. In Williard vs. Cambridge, 3 Allen, 574, we have a clear statement of the law on this point. A bridge, part of the highway, was obstructed and could not be used for some time. The plaintiff, a lumber dealer, had a wharf near the bridge, and his customers were interfered with by reason of the obstructed or useless bridge; the rents of his houses were diminished; and he had an increased expense in delivering goods by a circuitous route. But it was held he could not recover damages, because his injury was of the same kind suffered by all others who had occasion to use the bridge, although his damages exceeded in degree those of others.

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No right of way appurtenant to the plaintiff's property was taken; the access to his property along its street frontage was not disturbed. No property, right or way appurtenant to this house and lot was taken. Parties owning property abutting on that part of the street actually taken, disturbed or obstructed, are entitled to damages because of the special interest or right to the part of the street immediately in front of their respective properties. But if we go beyond this, where shall we end? To say the merchant and all others having occasion to use the streets, or owning property on or near the street which is in part obstructed, may recover damages, imposes an unjust burden upon railroad construction. If railroad companies could recover compensation for benefits conferred upon the numerous properties located in the vicinity of the roadway, there might be some reason for imposing such a burden.

If the plaintiff can recover in this case, "where are we to stop and what is to be the boundary?" What was said in Shrunk vs. Navigation Co., 14 S. & R., 71, and in Penna. Railroad Co. vs. Lippincott, 116 Penna. St. R., 484, applies with equal force to this plaintiff's claim. The plaintiff's property was not closed in, for he has an outlet to all parts of the town. Marble street, a public thoroughfare, intervenes between the railroad cut and the plaintiff's house and lot.

If the company is guilty of maintaining a nuisance by not providing proper crossings at Oak and Forrest streets, it is an additional reason why the plaintiff should not recover.

If he secures his damages for a permanent injury to the property, the proper authorities still have their remedy to suppress the nuisance; and the result would follow that the plaintiff secures his damages and at the same time a street restored to its free and uninterrupted use.

And now, May 7, 1888, judgment is entered for the defendant *non obstante veredicto* on the question reserved.

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In re Estate of George Blake, a Lunatic.

Where a committee in lunacy files an account, and the lunatic dies before distribution is made, the Common Pleas has no jurisdiction to make such distribution; the funds must be awarded to the lunatic's personal representative for distribution in the Orphans' Court.

Sur exceptions to the report of auditor making distribution.

H. B. Dickinson and *Samuel Money, Jr., Esqs.*, for exceptions.

Larzelere & Gibson, Esqs., contra.

The facts of the case sufficiently appear from the opinion of the court delivered January 16, 1888, by Swartz, P. J.

The committee in lunacy paid the liens of record and the expenses of the inquisition, including the costs of the proceedings to sell the real estate. After these payments were made there was a balance of $437.03 in the committee's hands and an auditor was appointed to make distribution of the same. The lunatic died after the auditor was appointed.

Had the auditor, appointed by the Common Pleas, authority to make distribution among the creditors, or should the fund have been awarded to the executors of the deceased lunatic?

The auditor makes the distribution and does so mainly upon the theory that these debts were contracted by the committee. We fail to see why these claims should be paid by the committee rather than by the executors of the estate of George Blake. They are the debts of the estate of George Blake, deceased, and if by reason of the proceedings in the Common Pleas they secured any preference such preference can be worked out in the distribution in the Orphans' Court as well as in the Common Pleas. The facts as taken from the testimony, however, show that the major portion of the claims allowed by the auditor were for debts contracted by George Blake before he was adjudged a lunatic.

We fail to see any good reason why this balance should not have been distributed through the executors in the Orphans' Court. This is the court that has full authority to make distribution in a decedent's estate, and to it all creditors look for a proper adjudication of their claims.

Whiteside vs. Whiteside, 8 Harris, 473.

Linsenbigler vs. Gourley, 6 P. F. S., 166.

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Why should this estate be distributed without giving to all claimants a full hearing in the Orphans' Court, the only place where all can be heard?

The committee by filing a petition in the Common Pleas can not give such a preference to some of the debts of the estate as will exclude all others. The claimants for funeral expenses must have an opportunity to be heard. It will not do to say to them you have no standing here and then distribute the whole estate to others. If their claims are to be adjudicated in the Orphans' Court then the fund must pass to the Orphans' Court for distribution.

Frankenfield's Estate, 11 W. N. C., 373, rules this case. The auditor should have awarded to the executors the sum of $370.47 for distribution in the Orphans' Court.

This was the property of the lunatic when he died. It is entirely unlike the proceedings in an assigned estate, where the assignor transfers his estate for a specified purpose; and it can not be likened to proceedings upon an execution where the law takes the property from the debtor and distributes it among the lien creditors. The sale in this case was but a conversion of the lunatic's real estate, the money belonged to him, the duties of the committee ended with the death of the lunatic, the law provided a new custodian for the fund.

And now, January 16, 1888, the exception filed by Hiram Blake, executor of George Blake, deceased, is sustained, and the report of the auditor is referred back to him to make distribution in accordance with this opinion.

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BARNES ET AL. VS. LOCH ET AL.

The owner of a partition wa'l, in which the owner of the adjoining property has an easement for the support of his building, may lawfully take down and rebuild said wall whenever it no longer subserves its purpose, or when necessary because of improvements, if by so doing he does not attempt to destroy the easement. The temporary inconvenience occasioned by such proceeding will not justify an injunction.

RULE for preliminary injunction.

Childs & Evans, Esqs., for rule.

F. G. Hobson and *N. H. Larzelere, Esqs.*, contra.

The facts appear from the opinion of the court delivered September 3, 1888, by WEAND, J.

The plaintiffs in this case pray for an injunction to restrain the defendants from removing or in any way interfering with a partition wall between their respective properties on Egypt street, Norristown. On January 1, 1868, James W. Schrack and A. A. Yeakle, the then owners of both properties, conveyed part thereof (being two certain messuages or tenements, beginning at a point on the northeast side of Egypt street, at the distance of twenty-four feet northwesterly from the north corner of DeKalb and Egypt streets), to James Barnes, plaintiff's testator, and in the deed described the east course "thence by other ground of Schrack & Yeakle southwesterly parallel to DeKalb street and at the distance of twenty-four feet therefrom, the line passing *along the northwest side of the gable end wall of the adjoining house of Schrack & Yeakle* one hundred feet to a corner at Egypt street, the place of beginning." The adjoining house referred to is now the property of John W. Loch, who holds it in trust for The Norristown Title, Trust and Safe Deposit Company. The Trust company, in order to erect a building suitable for their business, have torn down the old building; and also propose to remove the partition wall, and replace it by one more substantial and better adapted to the purposes for which the new erection is intended.

The deed to defendant describes his line as "beginning at the north corner of DeKalb and Egypt streets, thence along the northeast side of Egypt street northwesterly twenty-four feet to a corner, thence *along the northwest side of the partition wall between the house*

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on the hereby granted premises and the house on the adjoining premises now or late of James Barnes."

The plaintiffs contend that for many years the wall in dispute has formed the southeasterly wall of their house, and as a partition wall supported and enclosed their house, and the floors, ceilings, roof and foundations thereof; and that four inches of the front width of their lot are covered by said wall, which is absolutely necessary to the use and enjoyment of their house.

From the affidavit of Mr. Oberholtzer, the contractor, it appears that the only support which the Barnes building receives is from three girders resting on the wall in the first story, and that above the second floor there is no support whatever from the wall in question. He also testifies that the wall can be taken down to the second floor without any danger or damage to plaintiff's property by simply propping the girders until the new wall is ready to receive them.

The affidavit of Mr. Loch states that "where any girders are imbedded in the present wall the defendants will prop the same until their new wall is erected, and give the same girders in their new wall the same support as they had in the old walls."

From this statement of facts we must assume that the defendants are actuated by no improper motives, and that the effect of the contemplated improvement will be to give plaintiffs a better support than before, with only a temporary inconvenience. By their bill they admit notice of the proposed change.

From the deed before us the plaintiffs have no title to the wall itself, for the description in their own deed excludes it, whilst in that of the defendant it is plainly included.

The testimony of Mr. Calhoun and Mr. Oberholtzer as to the proper measurements from which to fix the point, twenty-four feet distant from the corner of DeKalb street, is conflicting; and, therefore, under the general principles that where the plaintiff's right is doubtful, or unless he shows a clear right, a preliminary injunction will be refused, we would be obliged to refuse this prayer.

It is, however, contended that they have such an easement in the premises as will entitle them to relief.

Assuming that plaintiffs have a right to the support of the wall, it does not follow that the owner thereof may not alter, change or improve the same for all legitimate purposes, if by so doing he does not attempt to destroy the easement.

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The affidavits of defendants disclose the fact that a new wall is absolutely necessary to adapt the property to its new use, and that plaintiffs will not be injured thereby. It is not proposed to deprive them of any rights which they now have, or claim to have, but simply to do that which is usual and necessary in the course of the many improvements caused by the growth of the town and the consequent increase of business. If defendants, who, for the purposes of this argument, are the owners, can not do so, who can? If we now deny them the right, what position will the plaintiffs or their vendees be in when they desire to improve or change their property? If the principle is correct, then, unless both parties consent, this wall must forever stand and be lost to future use when improvements are intended; and thus one, having but a permissive use of a thing, may forever control its future and thus deprive the owner of all benefit therefrom. The claim here made is not so strong as if this were a party wall; and even in such cases it has been held that every person has the right to take down even a party wall whenever the same becomes dangerous or no longer subserves its purpose, or if the same will not support a new structure which one owner proposes to erect on his own ground. Evans & Watson vs. Jayne, 11 Harris, 34; Partridge vs. Gilbert, 15 N. Y., 601.

In Evans vs. Watson, *supra*, Lowrie, J., in sustaining this principle, says that it is to be found in the Code Napoleon, wherein it was provided that "the builder of a new house may take down a party wall that is insufficient for his purposes and rebuild it at his own expense. And this expense is the best protection against an abuse of the right." In Helwig vs. Schenck, 7 Phila., 389, Judge Paxson said that a construction of the law such as "is here claimed, is a very narrow one, and is wholly unsuited to the wants of a large city. It would be an effectual check in many instances to the progress of improvement. The temporary inconveniences which a man may suffer in such a case is but as a feather in the scale compared to the advantage of such a regulation (allowing the removal) to the community generally; and he moreover derives ample compensation from the general improvement of property and the increase in value consequent upon such improvement." To grant an injunction under the circumstances of this case would be to deprive the owner of the legitimate use of his property. If this can be done many proper improvements might be prevented, and that which in the first instance

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may only have been intended as a favor be turned into a weapon by which the value of the property would be seriously diminished. Without further passing upon the merits of the case at this early stage, we deem it our duty to refuse the injunction.

And now, September 3, 1888, the rule is discharged.

Court of Common Pleas of Luzerne County.

BALDES VS. MALOY.

Under the act of June 3, 1887, a married woman can give a promissory note with confession of judgment which will be binding upon her.

RULE to strike off judgment.

John McGahren, Esq., for rule.

The opinion of the court, in which all the facts are disclosed, was delivered July 28, 1888, by RICE, P. J.

The judgment in this case was confessed by the defendant, who is a married woman, for the amount of a debt contracted by her when she was a *feme sole*. This rule was granted upon the application of her husband. At common law, and even under the act of 1848, this confession of judgment would have been void, and the defendant's husband would have had the right to intervene, just as he has done here. But the "married person's property act" has removed many of her disabilities. With some exceptions, which are specified, she now has the power "to make contracts of any kind, and to give obligations, binding herself therefor [Sec. 1]; to make, execute and deliver leases, * * * notes, bills, drafts, bonds, or obligations of any kind, and appoint attorneys to act for her, and it shall not be necessary for her husband to be made a party thereto or joined therein" [Sec. 3]; and has provided that "her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, suit, or legal proceeding of any kind brought by or against her in her individual right" [Sec. 2].

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The foundation of this judgment is a debt for which the defendant was individually and primarily liable, independently of the act of 1887. That act does not enlarge her liability for the debt, but clearly enabled her to give her own note for it, and entitled the plaintiff to maintain an action against her, either on the note or on the original debt, without joining her husband as a co-defendant. Her right and capacity to defend such suit, without the joinder and free from the interference of her husband, must carry with them the right to confess judgment therein, if, to save costs, or for any other legitimate purpose, she might deem it advisable so to do, and she has the express power to appoint an attorney to act for her. It was her legal incapacity in these respects which, at common law, prevented her from giving a valid confession of judgment. Now that these disabilities have been removed, we think it would be a narrow and illiberal construction of the act to declare that the power to give "obligations of any kind" is not comprehensive enough to enable her to give a promissory note with a confession of judgment for a debt contracted by her before her marriage. But it is contended that the real purpose of this confession of judgment was to convey, by means of a Sheriff's sale, the defendant's real estate, in fraud of her husband's rights as tenant by the curtesy. We do not deem it necessary to declare what would be the husband's rights to intervene in such a case (see Killinger vs. Ridenhauer, 6 S. & R., 531), for the reason that there is not sufficient evidence of the fact before us to fairly raise the question.

The rule is discharged.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

WILLIAM PENN BUILDING AND LOAN ASSOCIATION vs. ANDREW MAYER ET AL.

A master's finding of facts will not be disturbed unless clearly unsupported by the evidence.
The act of April 6, 1859, providing for service of an equity bill on non-residents, is unconstitutional so far as it provides for service on defendants not resident within the state.
A principal defendant designated by said act is one who is a necessary party to the bill, or one who will be affected by the decree.
The entry of an appearance and filing of an answer by non-resident defendants, served because of service on an alleged principal defendant, will not give jurisdiction to the court where the testimony alone must determine whether such resident defendant is a principal defendant.

EXCEPTIONS to the report of F. G. Hobson, Esq.

Larzelere & Gibson, Esqs., for plaintiffs.

Franklin March and *H. M. Brownback, Esqs.*, for Abraham D. Delp, one of the defendants.

Montg. Evans and *C. Berkley Taylor, Esqs.*, for other defendants.

The facts are fully disclosed in the opinion of the court delivered September 3, 1888, by SWARTZ, P. J.

The complainant filed a bill against Abraham D. Delp and six others. All the defendants were residents of Philadelphia county save Abraham D. Delp, who lived in this county, and was served as a resident within the jurisdiction of this court. Application was made to the court under the act of April 6, 1859, for leave to make service upon the Philadelphia defendants, because of the service on Abraham D. Delp, a resident and alleged principal defendant. Such service was afterwards made under the direction of the court.

The bill alleges that by reason of the conspiracy of the defendants the plaintiff association was defrauded out of large sums of money, and prays for a decree to compel them to repay the money so taken. The bill also asks that a preliminary injunction may be awarded against Mary V. Delp, one of the defendants, to restrain her from parting with any of her real estate, and that the beneficial ownership to certain Philadelphia real estate in the bill described be decreed to be in the plaintiff association.

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A general appearance was entered by the Philadelphia defendants, and an answer was filed by them denying the existence of any conspiracy and every allegation of fraud.

The introductory part of this answer reads as follows: "The answer of Andrew Mayer, Job W. Lewis, Joseph Valentine, James R. Dever, Mary V. Delp, and Mary V. Delp, administratrix aforesaid, saving and reserving to themselves all benefits of exception and objection to the manifold errors, uncertainties and imperfections in said bill contained, and to the jurisdiction of your honorable court, sets forth."

Abraham D. Delp, the resident defendant, also answered, denying the fraud and conspiracy charged against him.

At the close of the plaintiff's testimony the Philadelphia defendants asked that the master dismiss the bill for want of jurisdiction. This motion was overruled. The defendants gave no testimony. The case was then argued before the master. He found that the allegations of fraud and conspiracy against Abraham D. Delp were not sustained, and concluded that the court had no jurisdiction over the other defendants. He recommended that the bill be dismissed at the cost of the complainant. To this report the plaintiff filed exceptions, which are now before the court.

The complainant claims that the evidence fully establishes that Abraham D. Delp was a conspirator and aided the other defendants in perpetrating frauds against the association, whereby it lost $22,738; that the service under the act of April 6, 1859, was valid and effective even if no decree can be entered against the resident defendant; that the non-resident defendants, whether properly served or not, waived the question of jurisdiction by their general appearance and answer.

We considered carefully the evidence and argument of counsel relating to the part that Abraham D. Delp took in the alleged conspiracy. We fail to find any evidence that, in our judgment, is sufficient to justify the entry of a decree against him. He had no knowledge of the frauds perpetrated by his brother. As clerk for the brother he seems to have had full confidence in his integrity.

The letters and communications between the brothers are not such as are used by co-conspirators. The defendant was the dupe and not the accomplice of the embezzler who manifested such wonderful nerve in his bold but successful efforts to defraud the com-

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plainant association. Now that the plots and schemes of the conspirator are laid bare, we wonder how it was possible to enjoy the opportunities of this defendant and yet be ignorant of the frauds perpetrated; but this is our common experience where a trusted man violates the confidence placed in him. We give him a confidence which forgets every rule of business or propriety, and thus make his frauds possible. If we consider Samuel D. Delp as the trusted financial manager and head of the plaintiff association, we are not surprised that the brother was deceived as well as the other members of the association who showed such unbounded faith in Samuel's honesty.

Abraham D. Delp's acts are consistent with innocence and ignorance of any fraud. Take, for example, his act in taking the imperfect mortgage to Philadelphia for the purpose of having Samuel acknowledge it. Would a conspirator ask his co-conspirator to do the very thing which must necessarily defeat the purposes of the conspiracy? The master fairly considered the evidence, and his finding is justified by the testimony. Under such circumstances it is our duty to approve his findings of fact.

It follows that Abraham D. Delp is not a principal defendant, such as the act of April 6, 1859, contemplates. The bill charges conspiracy, and one who is simply brought in contact with the conspirators without any guilty knowledge of their purposes is not a principal defendant. It may be that Abraham D. Delp's acts aided the conspiracy; but these same acts would have aided the association but for their misuse by the conspirators. The Recorder may enter of record a forged mortgage, and thus enable the perpetrators of a fraud to realize money on it; but it will not do to say that such a Recorder, innocent of the character of the instrument, is a party to the conspiracy in making the fraudulent instrument. Such an interpretation of the act of 1859 would give it a scope never contemplated. Clear legislative authority must be shown to hold a man liable for civil wrongs in any forum other than that of his home, though his property may be subject to the jurisdiction of the courts of the county wherein it is found: Coleman's Appeal, 75 Penna. St. R., 458.

A principal defendant is one who is affected by the decree of the court, and necessarily involved in the subject in controversy: Cake vs. Coal Co., 11 Phila., 609.

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Can complete relief be given the complainant without making Abraham D. Delp a party to the proceedings? Will such omission affect or prejudice the rights of others? If not, then he is not a principal defendant: Coleman's Appeal, *supra;* Joy vs. Wirtz, 1 W. C. C. Rep., 518. How can a party who has no interest in the matter, and is in no way responsible to the complainant or other defendants, be a necessary party to a suit? Such is the position of Abraham D. Delp if our finding of fact is correct.

But it is said the bill is instituted concerning "goods and chattels" in the jurisdiction of this court, or concerning liens and incumbrances on real estate situate in this county. An examination of the bill discloses that the complainant seeks to recover money which was fraudulently taken from it. The bill asks that this money be repaid. Some of the bonds and mortgages spoken of in the complaint were found in the safe of the association in this county, but no suit is brought upon these; they are only used as evidence to establish the fraud of the defendants. The only land complainant seeks to recover consists of certain Philadelphia dwellings. There is nothing in this county that the defendants claim to have any interest in or title to that is also claimed by the complainant. The suit is not brought concerning any property in this county or within the jurisdiction of this court.

The act of April 6, 1859, is clearly unconstitutional so far as it provides for the service of a bill on defendants resident beyond the limits of Pennsylvania; but this does not prevent the other parts of the statute going into effect. The act provides for service on non-residents where a principal defendant residing in the jurisdiction is served, or where the property concerning which suit is brought is found in the jurisdiction. As the complainant has failed to bring itself within either of these provisions, the bill must be dismissed unless the defendants by some act have confessed jurisdiction.

The question of jurisdiction in this case relates to the person and not to the subject matter, for we think it is clear that if the court has jurisdiction of the person it thereby secures jurisdiction over the subject matter contained in this bill. The question of title to certain Philadelphia real estate may arise in the event of a decree being made against the defendant, Mary V. Delp; but when equity once takes jurisdiction of a subject matter, that carries with it juris-

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diction to decide every incidental question that is necessarily involved: Wilhelm's Appeal, 79 Penna. St. R., 120.

A defendant may appear and give jurisdiction over his person by consent; such waiver may be express or it may be implied from his acts by taking subsequent steps in the action without objection to the previous irregular or void proceedings. By proceeding with the case the defendant impliedly says that he will not take advantage of the privilege now open to him. His conduct induces the plaintiff to proceed, and it would not be right to allow the defendant thereafter to do that which he said he would not do.

If service had been made on the non-resident defendants directly —that is, without the aid of the act of 1859, providing for service on a resident principal defendant—it is clear that the appearance and answer of the defendants would have given jurisdiction to the court of the person of the defendants, and they could not be allowed at this late day to defeat the bill by a plea to the jurisdiction. Their conduct would have implied that they did not mean to avail themselves of a privilege they might have pleaded when the appearance was entered.

Does the fact that they were served under the act of 1859, by reason of the service upon Abraham D. Delp, an alleged principal defendant, change their standing before the court?

This can best be answered by ascertaining what the non-resident defendants ought to have done when they were served with the bill. The service upon its face was regular and in compliance with the order of the court. If the allegations of the bill are true, then service upon Abraham D. Delp authorized the court to direct the service that was made; and such service would bring the defendants within the jurisdiction of this court. A demurrer to the bill on the ground of jurisdiction would be useless. It is true they could have shown that the suit was not brought concerning property in this jurisdiction; the bill disclosed this fact. But could they have shown that Abraham D. Delp was not a principal defendant? The allegations in the bill, if sustained, clearly make him such principal defendant; and whether they would be sustained could be ascertained by an examination into the merits of the case, and by no other method. The jurisdiction depended upon a question of fact which could not be determined until the complainant completed his testimony. When the plaintiff's testimony concluded the non-resi-

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dent defendants promptly denied the jurisdiction of the court, gave no evidence, and asked that the bill be dismissed. It is true that these defendants knew whether or not they conspired with Abraham D. Delp, but did they or the court know whether Abraham D. Delp conspired with his brother to defraud the plaintiff association? If Abraham D. Delp did so conspire with his brother, these non-resident defendants though innocent might be liable to answer the complainant's allegation in this jurisdiction.

An appearance or answer is a waiver of jurisdiction when it is in the nature of an estoppel; that is, when it induces the complainant to proceed with his cause and do that which he might not have done but for such appearance or answer. In this case the plaintiff did only that which he was bound to do, even if the question of jurisdiction had been raised at an earlier day. To maintain jurisdiction it was necessary to show that Abraham D. Delp is a principal defendant, and this could be ascertained from the testimony alone. We fail to find anything in the acts or conduct of the non-resident defendants indicating that they waived the question of jurisdiction. Their answer gave notice that they reserved the right to question the jurisdiction. They only did that which they were bound to do if they intended to defend their rights. This seems like a hardship upon the complainant, but the circumstances of the case are responsible for it. When the plaintiff invoked the aid of the act of 1859 it was bound to bring itself within the provisions of that act or fail.

And now, September 3, 1888, the exceptions to the master's report are dismissed, and it is ordered, adjudged and decreed that the bill of complainant be dismissed at the cost of the plaintiff association.

This disposition of the case upon the master's report renders it unnecessary to examine into the merits of the petition filed, asking that the pending bill be dismissed because a bill was lately filed in the Philadelphia court against one of the defendants praying for the same relief asked under this bill.

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IN EQUITY.

HENRY BERGEY VS. HENRY C. KLINE, SHERIFF, ET AL., EXECUTION CREDITORS.

Manure made upon a farm in the usual and ordinary course of husbandry heaped up in the barn-yard and necessary to the farm to preserve its fertility, becomes a part of the realty and can not be sold upon a fi. fa as personalty to the prejudice of a prior mortgage creditor. Equity will interfere to prevent such sale.

RULE for preliminary injunction.

Jacob A. Strassburger, Esq., for rule.

William F. Solly, Bickel & Hobson, George W. Rogers and *Wm. F. Dannehower, Esqs.*, contra.

The facts of the case sufficiently appear from the opinion of the court delivered September 3, 1888, by SWARTZ, P. J.

Henry Bergey, a mortgage creditor of Samuel Garis, prays for a preliminary injunction to restrain the Sheriff of Montgomery county and certain judgment creditors of said Garis from selling as personalty manure heaped up in the barn-yard of the mortgagor's premises.

Samuel Garis, the debtor, is insolvent; this appears by the allegations in the bill and facts admitted upon the hearing for an injunction. Three executions are in the hands of the Sheriff. The sale by the Sheriff failed to realize sufficient funds to liquidate the last execution. "Insolvency is the state of a person who from any cause is unable to pay his debts in the ordinary and usual course of trade." "He must be able to pay or provide for all his debts as they shall fall due in the usual course of business": Levan's Appeal, 2 Cent. R., 571.

The mortgaged premises consist of a farm used for agricultural purposes. The manure was made upon it in the usual and ordinary course of husbandry, and was heaped up in the barn-yard as necessary to preserve the fertility of the soil.

As between landlord and tenant where the premises are let for agricultural purposes, manure made upon the farm in the usual and ordinary course of husbandry belongs to the freehold, because the removal of it under such circumstances would be prejudicial to good husbandry and ruinous alike to the landlord and tenant: Lewis vs. Jones, 5 Harris, 262; Ewell on Fixtures, p. 122; Tyler on Fixtures, p. 343.

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If such removal by the tenant is destructive of or injurious to the freehold, then such removal by the owner of the freehold or his creditors must be equally injurious. The doctrine that manure is a fixture and can not be removed by the tenant without injury to the freehold, applies with equal force to the vendor of a farm and his vendee; and in Goodrich vs. Jones, 2 Hill, 144, it was held that, as between vendor and vendee, manure is part of the freehold. To the same effect are Parsons vs. Camp, 11 Conn., 525, and Kittridge vs. Woods, 3 N. H., 503. Between the heir and the administrator of the decedent manure is realty: Fay vs. Muzzey, 13 Gray, 53.

Whether the contest be between vendor and vendee, landlord and tenant, owner of the freehold and his creditors or creditors of the same debtor, seems to us immaterial. Is the property in question made a part of the freehold for the enjoyment of the inheritance, is the inquiry in each case. Under the facts and allegations in the bill we are of opinion that the manure in controversy is realty, and is an appurtenance of the premises.

Will equity interfere at the suit of a mortgage creditor and restrain the Sheriff and junior judgment creditors from selling the manure as personalty? The mortgagee has a lien upon the freehold and its appurtenances, and that which injures the realty injures his security. He is entitled to a writ of estrepement to prevent waste. When machinery which forms part of the realty is removed and sold as personalty, the mortgagee may follow and recapture it from the hands of the purchaser: Hoskins vs. Woodward, 45 Penna., 42.

Suppose the removed property can not be found, and the purchaser as well as the mortgagor is insolvent, what remedy remains to the mortgagee? If he has the right of recapture to satisfy his lien, we ought, by his diligence, to allow him to keep the property in place.

The subsequent lien creditors have no cause of complaint, for they had no legal right to be paid out of the debtor's real estate to the prejudice of the mortgagee: Witmer's Appeal, 45 Penna., 461.

In the case just cited a bill was sustained restraining the Sheriff and junior judgment creditors, at the suit of a prior judgment creditor, from removing and selling an engine which formed part of the real estate bound by the lien of all the judgments. To the same effect is Camp vs. Bates, 11 Conn., 51.

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In the case before us the owner did not sell the manure; no act of his indicates that he treated the manure as personalty. Even if he could make a severance of it, he has not done so; and the officer of the law will not be allowed to do it for him, to the injury of the complainant.

In Sawyer vs. Twiss, 26 N. H., 345, it was held that manure made upon a farm in the ordinary course of husbandry is not liable to be attached for the debts of the owner of the land as personalty, and an officer attaching and removing it is liable as a trespasser.

We are of opinion that the manure in question is an incident or appurtenance of the real estate of Samuel Garis, and can not be sold as personalty by the Sheriff to satisfy the judgments of the defendants.

And now, September 3, 1888, the preliminary injunction is awarded as prayed for upon the complainant entering into bond in the sum of $200 with approved sureties.

GEORGE N. WEAVER VS. HANNAH KEITH, EXECUTRIX, ETC.

H. and G. being the owners in equal shares of real estate, mortgaged the same to secure H.'s indebtedness. Afterwards K. entered a judgment against H.

On a sale of the premises more than enough was realized to pay the mortgage debt and interest. Both K. and G. claimed the surplus. *Held*, that the fund belonged to G. to the extent that his interest was taken to pay H.'s debt.

CASE stated.

Louis M. Childs, Esq., for plaintiff.

Neville D. Tyson, Esq., for defendant.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by WEAND, J.

Henry P. Weaver and George N. Weaver, being the owners in equal shares of certain real estate in the borough of Norristown, mortgaged the same to secure certain indebtedness of Henry P. Weaver. Afterwards Hannah Keith, executrix, entered a judgment against said Henry P. Weaver, which became a lien upon his interest in the real estate. The property was sold under proceedings on the mortgage, and after the payment of the mortgage debt, interest and costs there remained a balance of $994.41, one-half of which was by consent paid to George N. Weaver. The contention now is to the disposition of the other half, which is claimed by George N. Weaver, the plaintiff in this issue, and by Hannah Keith, executrix,

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the defendant. The parties have agreed upon a case stated for the opinion of the court, in which the above facts are stated.

Starting with the fact that George N. Weaver was but a mere surety for Henry P., it must be conceded that if no other creditors had intervened he would be entitled to the whole of this fund. His property had been taken to pay his principal's debt, and he would be substituted to the rights of the creditor. That the mortgage was extinguished can make no difference, for though actual payment discharges a judgment or other incumbrance *at law*, it may subsist in equity when justice requires it: Cottrell's Appeal, Bowers' Estate, 11 Harris, 294.

The result of the sale shows that Henry P. Weaver's interest did not realize enough to pay his indebtedness to the mortgage creditor, and as George's estate was partly taken to make up the deficiency he is clearly entitled to the balance of the fund as against Henry P. himself.

Does the fact that another judgment was entered against Henry P. change or modify this right? A judgment creditor is not a purchaser for value, and is only entitled to be paid out of the interest of his debtor. Now that interest here was exactly what would be coming to Henry after the rights of himself and George had been determined, and these rights must first be adjudicated and ascertained before it can be determined what interest Henry himself had in the fund.

The claim for Mrs. Keith is made upon the principle that where one creditor has a right to go upon two funds, and another creditor upon one of them only, both belonging to the same debtor, the former may be compelled to apply first to the fund which can not be reached by the second, so that both claims may be satisfied.

In illustrating this principle Judge Story, in his work on Equity Jurisprudence, says: "But if the first creditor has a judgment against A and B, and the second against B only, and it does not appear whether A or B ought to pay the debt due to the first creditor, nor whether any equitable right exists in B to have the debt charged against A alone, in such a case equity will not compel the creditor first to take the land of A in satisfaction of it; for it is not a case of different debts and securities against one common debtor." But when, as in this case, it *does* appear that Henry should pay the first creditor, and where an equitable right *is* in George to

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have the debt charged against Henry alone, the reason for the rule would seem to have ceased.

In ex parte Kendall, 17 Vesey, 520, Lord Eldon said: "It was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A, without more; as if B himself could insist that A ought to pay in the first instance, as in the ordinary case of drawer or acceptor, or principal and surety, to the intent that all obligations may be satisfied. But if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, *if not founded on some equity*, giving B the right for his own sake to compel me to seek payment from A." But here there was no right on the part of Henry P. Weaver to make any such demand; but, on the contrary, it was George's right to insist that Henry should first be called upon. The equities are with the surety and not with the principal or his creditors.

We can better illustrate the principle by supposing that judgments had also been entered against George subsequent to the Keith judgment against Henry, in which case they would have had an equity to compel Henry's creditor to first proceed against his separate estate. In Neff vs. Miller, 8 Barr, 347, Judge Bell said: "It would be the same if the judgment was recovered by A for B's proper debt, C being merely surety, for in both these cases B ought to have paid the judgment; and C's estate being taken for it, to the exclusion of C's judgment creditors, he ought, on equitable principles, to be permitted to receive out of B's estate so much as he lost by the application of C's estate to the payment of B's proper debt. Nor can the subsequent judgment creditors of B complain of this. They acquired their securities with a full knowledge of and subordinate to the prior joint judgment, and have no legal or equitable right to demand that a mere surety shall discharge it for their benefit. Here is a surety whose money has been applied in payment of the debt of the principal to the exclusion of his own proper creditors. That he would be entitled to come in, by way of substitution, upon the estate of the principal, is every day equity." Upon the principles of equity, therefore, the fund in the Sheriff's hands represents that much of George N. Weaver's property which he could claim as against Henry P. Weaver; and even after receiving this amount he will be the loser. His right to be subrogated is higher than the claim of the judgment creditor, and in equity he is entitled to the fund.

And now, September 17, 1888, judgment is directed to be entered in the case stated in favor of George N. Weaver with costs.

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ELIZABETH GENTER VS. SAMUEL VAN WINKLE.

In a suit against a married woman where the liability on the part of the wife nowhere appears on the face of the transcript, the proceedings are *ceram non judice;* and upon certiorari the proceedings of the justice will be set aside.

CERTIORARI.

D. O. Rogers, Esq., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by SWARTZ, P. J.

The transcript discloses that the defendant in error sold meat in the life-time of F. S. Genter, the husband of the plaintiff in error. The suit was brought against the widow. The transcript fails to show who bought the meat, or upon whose credit it was furnished. The legal representatives of the husband are not made a party to the suit. The record of the justice states that the summons was issued April 20, 1883, the demand being for "a beef bill bought in the life-time of F. S. Genter, her husband." The record must show that the debt was contracted by the wife and was incurred for articles necessary for the support of the family, before the wife's separate estate is liable: Fell vs. Brown, 6 Cent. Rep., 594; Hecker vs. Haak, 88 Penna. St. R., 242; Berger vs. Clark, 79 Id., 340.

"Where the liability on the part of the wife nowhere appears on the face of the transcript, the proceedings before the justice are *ceram non judice.*" There is no jurisdiction to enter such judgment, and the judgment if entered is absolutely void: Gould vs. McFall, 1 Cent. Rep., 853.

We may add that the legal representative of the husband should have been made a party to the suit; even if the wife's estate is liable for necessaries furnished to the family upon the credit of her separate estate, the husband is primarily liable for such debt.

And now, September 17, 1888, the exceptions are sustained and the proceedings before the justice are set aside.

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DAVID POWELL VS. PRUDENTIAL INSURANCE COMPANY OF AMERICA.

A sub-agent appointed by an agent can not recover compensation from the principal where the appointment was made without the knowledge or consent of the principal.

MOTION to take off non-suit.

George N. Corson, Esq., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by SWARTZ, P. J.

The plaintiff was non-suited because the agency, if any existed, was a sub-agency created without authority by one of the assistant superintendents of the defendant company.

Powell, the plaintiff, solicited insurance, but the applications he secured were returned to the office of the assistant superintendent in the name of Zimmerman, the regular solicitor duly appointed by the company. The plaintiff testified that sometimes he placed his own name on the applications; but this was not allowed by the assistant superintendent, for the plaintiff says his name was always erased and Zimmerman's substituted.

These applications when received at the home office in Philadelphia gave no notice of the part Powell may have had in securing them. This circumstance, testified to by Powell, corroborates the testimony of the assistant superintendent, who alleges that Powell was never recognized as an agent of the company but as an employe of Zimmerman.

Specht, the assistant superintendent, denies that he employed the plaintiff, and adds that he had no authority to do so. He explained at length how canvassers could be appointed, after certain formalities had been complied with; that these appointments were made by the company at the home office, and certificates were issued by the company to the appointees.

The uncontradicted testimony shows that the assistant superintendent had no authority to make the appointment that the plaintiff claims was made by Specht in this case.

A sub-agent appointed by an agent can not recover compensation from the principal where the appointment was made without the knowledge or consent of the principal. An exception is made when the character of the business of the agency is such that by the usage of trade sub-agents are employed. No such usage of trade in the defendant company's business was shown; on the contrary,

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it was proven and not contradicted that no such usage existed in the company's method of doing business.

From the plaintiff's own testimony it is clear to us that he was but an assistant of the solicitor, Zimmerman. But assuming that he was appointed by Specht, the testimony shows there was no authority in Specht to bind the company by such an appointment; and lastly, even if the plaintiff was the authorized agent of the company, we fail to find any testimony for submission to the jury from which they can find that there is money due him either by the company, its agents or sub-agents.

And now, September 17, 1888, the motion to take off non-suit is refused.

In re Assigned Estate of Jacob B. Rhoads and Wife.

Interest due upon a mortgage on land, sold by assignees by order of court, under the act of February 17, 1876, is not payable out of the proceeds of sale.

Where an assignee becomes a purchaser at his own sale, he will not be allowed extra compensation or counsel fees where it appears that the contention before the auditor was not on behalf of the estate but merely to protect himself as purchaser.

Exceptions to report of Jacob V. Gotwalts, Esq., auditor to distribute.

J. P. Hale Jenkins and *H. B. Dickinson, Esqs.*, for exceptions.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by Weand, J.

We can not sustain either of the exceptions filed by the assignees or Ann Rhoads. The assignees are mere stakeholders, and as such not concerned in the distribution amongst creditors. It was not for them, therefore, to complain that the auditor had preferred a particular creditor. They had a standing, however, to except to the disallowance of their claim for extra compensation. The auditor was clearly right in holding that neither the mortgage nor its interest was discharged by the sale. The mortgage lien is expressly preserved by the act of Assembly and the order of court, and its interest, being a part of the claim, abides the payment of the principal. The auditor has so fully demonstrated this proposition by reason and authority that we deem it useless to do more than affirm his judgment.

The claim of Ann Rhoads had nothing to support it. It was not shown that she had any interest or ownership in the land ex-

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cept as a creditor, and as such her rights are regulated by the position of her lien. All the exceptions filed by the assignees and by Ann Rhoads are therefore dismissed.

The first, second and third exceptions, filed by Milton Jenkins, are sustained.

Two of the assignees became purchasers of part of the premises. Through a misunderstanding they bought under the impression that interest on the undivested liens would be paid out of the fund realized from the sale. They, however, filed no exceptions to the sale but accepted title. In their account they took credit for interest paid on these liens. The contest before the auditor was principally upon this point. Had the account been filed without these credits the assignees would not have been put to any trouble or inconvenience before the auditor.

The whole contention was to save themselves as purchasers from the payment of this interest. The employment of counsel was for that purpose. All that was done by them was in the character of purchasers and not as assignees, and therefore it was clearly wrong to allow them extra compensation as assignees when as such they had no part in the contest. With the same propriety could any creditor who fails in his contention claim compensation, expenses and counsel fees.

In their account they charged commissions which must have appeared to them satisfactory. They do not allege mistake in fixing the amount, and the auditor seems to have allowed them extra compensation because of their mistaken rights as purchasers. By filing their account they waived any further claim except for additional services: Brinton's Estate, 10 Barr, 408. We believe these assignees acted honestly in the matter, and they are entitled to sympathy; but we must not compensate them in money at the expense of other creditors who protest against it, and whose lien is already reduced to the extent of the costs by this litigation on behalf of these unsuccessful contestants. Exception was also taken to the charge of the auditor. By an inadvertence he charged for more days than were actually occupied, and by deducting these we allow him one hundred and ten dollars, which is not more than the law allows or his very well prepared report would warrant. We will therefore restate the distribution according to this opinion, the exceptions to the allowance of interest to Heebner and Kulp and commissions of accountants and their attorney fees being sustained.

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SUSAN A. CAIN, BY HER NEXT FRIEND, P. RITTENHOUSE, VS. JOHN G. CAIN.

In a proceeding for divorce the court of the county where the injured party resides at the time of filing a petition has jurisdiction, although the petitioner be the wife, who has removed from the county where her husband is living, she having withdrawn from his residence because of cruel treatment, etc.

MOTION to quash proceedings in divorce.

Bickel & Hobson, Esqs., for motion.

Webster A. Melcher, Esq., contra.

The facts of the case sufficiently appear from the opinion of the court delivered September 24, 1888, by WEAND, J.

The libellant, Susan A. Cain, presented her petition for a subpœna sur divorce upon the ground of cruel and barbarous treatment endangering her life, and because of such indignities offered to her person as to render her condition intolerable and life burdensome, and thereby forcing her to withdraw from her husband's house and family. A subpœna was duly awarded and personal service had upon the husband, John G. Cain, who now moves to quash the proceedings because of the want of jurisdiction of this court.

It appears from the facts before us that the parties were married in Lancaster county, Pennsylvania, in 1869, where they lived together as man and wife until about November 16, 1885, when the libellant came to Montgomery county, where she has since resided, earning her own living.

The respondent now claims that this court has no jurisdiction, because the wife can have no residence or domicile different from that of her husband, and that the jurisdiction is exclusively in the court of the domicile of the parties at the time of the injury.

This question is comparatively a new one in Pennsylvania, and is deserving of some consideration.

The act of 13 March, 1815, Sec. 2, Pur. Dig., 614, pl. 12, under which divorce proceedings are instituted, provides: "If any person has been injured as aforesaid, the husband, in his own proper person, or the wife, by her next friend, may exhibit his or her petition or libel to the judges of the court of common pleas of the proper county *where the injured party resides*," etc. If, therefore, Mrs. Cain, the libellant, resides in Montgomery county, within the meaning of the act, our jurisdiction is unquestioned. Does she therefore reside

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here? Her answer and the depositions submitted to us establish the fact that so far as is in her power she has made her home in this county and has lived here since 1885, and that she has no intention of returning to Lancaster county or leaving her present abode. In Fry's election case, 21 P. F. S., 302, Judge Agnew, in a well considered opinion, decided that residence and home are synonymous terms, and that the word residence in the election laws means a place of permanent abode, domicile or home. And in his Conflict of Laws, 841, Judge Story says: "By the term domicile, in its ordinary acceptation, is meant the place where a person lives or has his home." The respondent, however, contends that although the libellant may live or have a residence here in fact, yet in law she can not have a domicile different from that of her husband so as to enable her to sue him. As an abstract proposition this is true; but we do not think that the principle applies in proceedings for divorce under the laws of this state. The Legislature has not qualified the right to present a petition except that the injured party shall have resided in the state and county without reference to the abode of the other party. And our Supreme Court in Fillman vs. Fillman, 3 Out., 286, has held that service in another county is good.

Whilst the important question here was not before the court in that case, yet the principle seems to have been unquestioned. In the argument of the counsel for appellant the ground was distinctly taken "that the county of Philadelphia, being the place of residence of the libellant, was the only place where the suit could be brought, as the act of Assembly provides that the subpœna must issue from the Court of Common Pleas of the county where the injured party resides; and in that case the husband resided in Montgomery county. An examination of the cases of Reel vs. Elder, 12 P. F. S., 308; Colvin vs. Reed, 5 Id., 375; and numerous others which lay down the doctrine that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both, show that it is applied only to those cases where one of the parties is a non-resident of the state and no service had. And the reason for the rule in these cases is apparent.

The defendant not being amenable to the state laws can not be bound by its decree without notice; but we apprehend that a different rule prevails in divorce cases where both parties are residents of

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the state and service had. No harm is done the defendant—he is judged by the same law which prevails in his own county, and the doctrine of *ab. inconvenienti* does not avail him. If he has driven his wife from her home, and obliged her to seek safety and shelter in another county where she is obliged to make her home in order to earn a living, he ought not to complain that he shall come to her county to answer her plea rather than she shall go to his.

Mr. Bishop, in his work on Marriage and Divorce, Vol. I, Sec. 123, lays down the law thus: "The general rule of law is familiar, that the domicile of the wife follows the husband's. Still, it will probably be found, on examination, that the doctrine rests not merely on the legal identity of husband and wife but also more particularly on her duty to dwell with the husband wherever he dwells. If he commits an offence which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to dwell with him, but she must abandon him, or the cohabitation will amount to condonation and bar her claim to the remedy. In other words, she must establish a domicile of her own separate from his, though it may be or not in the same judicial locality with his. When the wife is plaintiff in a divorce suit, it is the burden of her allegation that she is entitled through the misconduct of her husband to a separate domicile." And this section is quoted entire and cited approvingly by the Supreme Court of the United States in Barber vs. Barber, 21 Howard, 582.

Mr. Bishop further says, Sec. 156: "Having arrived, therefore, at this conclusion, we shall find no difficulty in settling, upon principle, that, as a question free from any statutory incumbrance, the courts of the actual *bona fide* domicile of either may entertain the jurisdiction."

In Harteau vs. Harteau, 14 Pickering, 181, the court said: "The law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home, bed and board; being put a part for the whole, as expressive of the idea of *home*. Otherwise the parties in this respect would stand upon very unequal ground,

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it being in the power of the husband to change his domicile at will but not in that of the wife."

The proceedings in divorce are purely statutory, and when, as in this case, both parties are citizens of Pennsylvania, the Legislature has the right to regulate the status of both husband and wife. When, therefore, the law says distinctly that the court of the county where the injured party resides shall have jurisdiction, it must have contemplated that either could acquire a residence separate from the other, for a separation, actual or constructive, is implied in cases of desertion and abuse. If the Legislature had intended that proceedings must be had where the husband resides or where the offence was committed, it would have said so; but when the residence of the injured party is mentioned we must read the law as it is written, and not give it a construction other than its words would imply.

If the decision of this point is correct, it also rules the second position—*i. e.*, that the jurisdiction is exclusively in the courts of the domicile of the parties at the time of the injury. The word domicile, used in the cases where the law is thus declared, again refers to domicile in the state and not in the county. Judge Gibson's decision upon this point, even as applied to the state, was doubted by Judge Agnew in Colvin vs. Reed, 5 P. F. S., 375, where the court said: "On one point the opinion of this eminent jurist has been much doubted, to wit: the *locus delicti*, which he asserts is also essential to the jurisdiction. It is denied by Mr. Bishop (M. & D., §§ 172 to 177 inclusive), and the Legislature has since furnished a different rule in cases of desertion and adultery (act of 26 April, 1850)," as has also the acts of 9 March, 1855, Sec. 1, P. L. 68, and 22 April, 1858, Sec. 1, P. L. 450, in cases of personal abuse, etc.

Where both parties reside in the state at the time the wrongful acts were committed and suit commenced, we have no doubt that the court of the county where the injured petitioner resides when the libel is filed has jurisdiction of the matter; and as on this rule the petitioner has shown a residence within the county sufficient to allow her to file her petition, the motion to quash must be denied.

And now, September 24, 1888, the motion to quash is overruled.

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Orphans' Court of Montgomery County.

Estate of Jacob Rèed, Dec'd.

Where an administrator proposes to show the estate is insolvent by reason of his own claim, the costs of audit are properly put upon the estate even if he succeeds in establishing his claim, unless the exceptant vexatiously litigates before the auditor.

Exceptions to the report of Joseph Fornance, Esq., auditor in said estate.

J. P. Hale Jenkins, Esq., for administratrix, the exceptant.

Larzelere & Gibson, Esqs., contra.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by Swartz, P. J.

Jacob Reed died intestate, leaving to survive him a widow, Sarah Reed, and one son, Leidy Reed. Letters of administration were awarded to the widow.

Charles Massinger, a judgment creditor of Leidy Reed, caused an attachment execution to issue upon his judgment, and under this attachment Sarah Reed, the administratrix, was summoned as garnishee.

The administratrix sold the real estate for the payment of debts and filed her account. After paying costs, expenses, and all debts other than her own claim, there remained in her hands the sum of $2123.30. In her account she took credit for this sum as "cash paid Sarah Reed on account of her notes." This sum was not sufficient to liquidate her notes against the estate. The estate was therefore insolvent, and the auditor finds that there is nothing for distribution to the heir, Leidy Reed, whose interest in the estate was attached as aforesaid. The accountant excepts to the report of the auditor because he directed the expense of audit, amounting to $60, to be paid out of the estate, and claims that the said costs should have been imposed upon the attaching creditor.

By the nineteenth section of the act of 29th March, 1832, it is made the duty of an executor or administrator where there is a deficiency of assets to apply for the appointment of an auditor to ad-

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just the proportions payable to creditors. Without such auditor the distribution by the administrator is a voluntary payment, and such payment or voluntary distribution is not made good as to third parties even after the confirmation of the account in which it was included. The distribution by the auditor was therefore of the highest importance to Sarah Reed, both as administratrix and as a creditor. It protected her as accountant and established her claim beyond dispute as soon as the Orphans' Court confirmed the auditor's report.

Where an administrator proposes to show an estate to be insolvent by reason of his personal claims against the decedent, it is due to the creditors and distributees that full disclosure be made of the nature and character of the claims. Especially is this so where the claimant is a married woman. The attaching creditor represented the interest of the heir, and when he only asked for that which it was the duty of the claimant to offer upon her own motion, we see no propriety in subjecting him to costs which were incurred for the accountant's protection.

The costs of audit necessary to make a proper distribution are payable by the estate: Harding's Estate, 24 Penna. St. R., 189; Graver's Appeal, 50 Id., 189; Smith's Appeal, 47 Id., 424.

Where a creditor vexatiously litigates a claim before an auditor, he may be ordered to pay a part or the whole of the costs of audit: Hammett & Son's Appeal, 72 Penna. St. R., 337. We can not say that the attaching creditor did anything more than was his right. When the claimant established her debt, as required by law, the attaching creditor submitted by acquiescing in the findings of the auditor without excepting thereto.

And now, September 17, 1888, the exceptions are dismissed and the report of the auditor is confirmed.

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Estate of William A. Bell, Dec'd.

Forbearance is a good consideration to support a promise to pay a mechanics' lien against the promissor's land for which he was not personally liable, although the promise was not in writing—and the debt contracted by a former owner. A promise made under such circumstances is a new, original and binding contract, and not contrary to the statute of frauds and perjuries.

Exceptions to the report of William F. Solly, Esq., auditor in said estate.

George W. Rogers, Esq., for residuary legatees, the exceptants.

H. B. Dickinson, Esq., contra.

The facts of the case sufficiently appear from the opinion of the court delivered September 17, 1888, by Weand, J.

The claimants in this case had filed mechanics' liens against property owned by Jeremiah Frantz, but conveyed before completion to William A. Bell, who is now deceased—more than five years from time of filing and before any proceedings thereon had elapsed at the death of Bell—and the claimants therefore lost their lien.

It is claimed, however, that Mr. Bell made this debt his own by promising to pay it in consideration of suits not being brought on the liens. The attorneys who represented the claims sent for Mr. Bell, and in conversation he begged them not to bring suit or make costs, and that he would pay the claims. Suits were not brought, and therefore, unless the claims are allowed out of Bell's estate, the lien creditors will lose their money. Numerous cases can be cited to show that forbearance is a good consideration to support a promise to pay: Hesser vs. Sheiner, 5 W. & S., 476; Giles vs. Ackles, 9 Penna. St. R., 147.

It is, however, contended that the promise not being in writing is void under the statute of frauds and perjuries. We think, however, that this being a claim against the realty of decedent was not such debt of another as is contemplated by the statute, which evidently contemplated that class of debts for which the promissor or his estate was not liable. Here were liens which could only be discharged by payment by the owner of the land, or by its sale on the liens. To avoid suit, costs and sale the owner agrees to pay if pro-

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ceedings are not instituted. Relying upon such promise the parties forbear to sue, and lose their liens. To hold that the promise to pay, which was the consideration for the forbearance, is not binding, would be grossly inequitable.

In Arnold vs. Stedman, 9 Wr., 186, it was held that "where the leading object of a promissor is to induce a promissee to forego some lien, interest or advantage, and thereby confer on the promissor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original and binding contract, although the effect of it may be to assume the debt and discharge the liability of another." "Whenever the main purpose and object of the promissor is not to answer for another but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another." 2 Parsons on Contracts, 4th ed., 306. We therefore think that the auditor was right in his conclusions.

And now, September 17, 1888, the exceptions are dismissed and the report confirmed.

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Estate of Lukens V. Clayton, Dec'd.

Where a person serves in the capacity of a domestic servant and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid or that the service was performed on the footing that no payment was to be made; but such presumption does not arise where the servant continues in the employment to the time of the master's death, and demands his wages after such death.

Evidence in this case held sufficient to sustain claim.

Exceptions to the report of James W. Schraçk, Esq., auditor in said estate.

Jacob V. Gotwalts, Esq., for exceptions.

Samuel Money, Jr., Esq., contra.

The facts of the case sufficiently appear from the opinion of the court delivered October 1, 1888, by Swartz, P. J.

Mahlon Maddock presented a claim against the estate for wages due him as bar-tender for the decedent. He was allowed to testify in support of his own claim. This was error. Unless he established his claim without the aid of his own evidence, the claim must fall. He proved by others that he served as bar-tender from April 1, 1878, to the date of decedent's death, December 14, 1885. In support of his claim he offered a book wherein he kept an account of his wages. The book shows the payments made to him and the dates when they were made, and at the end of each year the claimant, as shown by his book, closed the account by ascertaining the balance due him. He kept a separate account for each year, and all payments made during any particular year were credited upon the wages for that year. The claim consists of these balances due him for the respective years. Under Yearsley's Appeal, 48 Penna. St. R., 531, this book was properly admitted in evidence. Is the evidence sufficient to sustain the claim? The wages of a bar-keeper in a tavern are deemed servants' wages: Boniface vs. Scott, 3 S. & R., 351. Because the claim is for servants' wages it is contended that the law presumes payment. If the claimant had left the employment without demanding his wages, such a presumption would arise. The servant remained, however, to the time of the decedent's death, and was continued by the widow in the same employment. The wages were demanded of the administrator very soon after letters were granted.

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Clayton's Estate.

McConnell's Appeal, 97 Penna. St. R., 31, goes no farther than to decide that "where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made by the servant for a considerable period after such service has terminated, the inference is either that the wages have been paid or that the service was performed on the footing that no payment was to be made." If there is such a presumption in this case it is weakened by the circumstances, and will require little evidence to rebut it. The book seems to have been regularly kept. The decedent was short of funds, as is shown by the number of old claims proved against the estate. The liquor bills were unpaid for years; even the attorney who secured the license was forgotten, and his fees were unpaid for several years. The decedent borrowed money from his hostler, and owed him $100 of borrowed money when he died. These facts indicate just such a condition of affairs as to the bar-keeper's claim as is disclosed by his book. In the absence of any proof against the claim it must be allowed. Part of the claim is barred by the statute of limitations. The $200 paid by the administrator in May and June of 1886 will not revive the claim. According to the claimant's book and account, each year was independent of the other. He appropriated the payments at the time they were made, and he can not now be allowed to alter his account. He claims for balances due April 1, 1879, '80, '81, '82, '83, '84, '85, and December 14, 1885. When the payment of $200 was made the balances for 1879 and 1880 were barred. He had a right to appropriate them to the oldest balances then still collectible—that is, for the amounts due April 1, 1881, and April 1, 1882. These balances with the interest accrued exceeded the payments. The claim was presented on April 4, 1888. All balances due prior to April 4, 1882, were barred. York's Appeal, 17 W. N. C., 33. He must be allowed for the years ending April 1, 1883, 1884, 1885, and the part of the year ending with the death of the decedent.

Balance due April 1, 1883	$85 00	Interest	$25 50
" " April 1, 1884	70 00	"	16 80
" " April 1, 1885	41 50	"	7 47
" " December 14, 1885	55 00	"	7 56
	$251 50	"	$57 33
Total of claim allowable			$308 83

The claim of White, Hentz & Co. was allowed in part. The auditor found that some part of the claim was barred by the statute

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of limitations. The original claim is not before us, but as we understand the accounts the auditor determined this matter correctly. The claim was objected to by a creditor who had standing, as was apparent according to the accounts presented. The reformation of the auditor's report will show that the allowance of the Maddock claim will not render the estate insolvent. The administrator, widow or guardian of the minor children can plead the statute of limitations against the claim of White, Hentz & Co., and unless they have had a full opportunity to do so the claim can not be allowed. As the report must be referred back for correction, the auditor can allow this claim if the parties in interest do not claim the benefit of the statute. They should have notice of their rights, as the new distribution will place the estate in a different attitude as to their rights; at least, it may appear different to them.

And now, October 1, 1888, the report of the auditor is referred back to him for the purpose of making an amended distribution in accordance with this opinion.

Supreme Court of Pennsylvania.

THOMAS J. QUIGLEY VS. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD CO.

When a street has been located on a town plot, but has not yet been opened for public use, the land covered by it is still the property of the former owner, subject to the right of the authorities to open the street at any time.

If while the street is yet unopened the land covered by it is occupied by a railroad company, said company is liable to the owner in damages for the land so taken.

A railroad company having occupied a street laid out in the borough of C., which was not yet opened for public use, and which was already occupied by a railroad siding, the property of one Q., to whom the land covered by the unopened street belonged, Q filed his petition praying for viewers to assess the damages done to him by this occupation. On an appeal from the award made by the viewers the Judge charged the jury that as the land taken by the railroad company was an unopened road laid out on the plan of the borough, the plaintiff could not recover unless the evidence showed that the company had raised an embankment or made some excavation which altered the general level of the street. *Held*, to be error.

ERROR to the Common Pleas of Montgomery county.

The full charge of the court below, by BOYER, P. J., will be found reported in 2 MONTGOMERY COUNTY LAW REPORTER, 109.

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Charles Hunsicker, Esq., for plaintiff in error.

Charles H. Stinson, Esq., for defendant in error.

The opinion of the Supreme Court was delivered October 1, 1888, by JUSTICE STERRETT.

A brief outline of facts on which this contention is based will conduce to a better understanding of the questions involved.

In December, 1883, the railroad company, defendant, presented its petition to the Court of Common Pleas, setting forth that it desired "to take and occupy for the purpose of constructing and operating its railroad, etc., all the right, title, interest, claim and demand of Thomas J. Quigley of, in and to a certain private railroad siding, situate in the borough of Conshohocken, and the ground upon which the same rests, in so far as the same is located upon" certain premises described by metes and bounds in said petition; that the company is unable to agree with said Quigley "upon the compensation to be paid for the damages done or likely to be done or sustained in consequence of the taking and appropriation of said land"; that a bond with sufficient sureties has been tendered to and refused by said Quigley, and praying the court to approve the bond and direct the same to be filed for the use and benefit of said Quigley. On notice to him the bond was accordingly approved and filed, and thereupon the company entered upon the premises described in its petition and proceeded to construct its road.

In March, 1884, on Quigley's petition, viewers were appointed "to view the premises of said petitioner and assess the damages done and likely to be done to him, both direct and consequential, by reason of the taking of the lands of said petitioner, and the location, erection and construction of the said railroad and its appurtenances, as required by the Constitution and laws of this commonwealth, and make report," etc.

The viewers reported they had "estimated and determined that the railroad company shall pay to said Thomas J. Quigley the sum of $4,628 as amount of damages to which he is entitled by reason of said railroad company taking and occupying, for the purpose aforesaid, the premises described in said papers annexed to said petition, and also for the said materials therein contained; and they further report that the ground taken as aforesaid is land used solely for business purposes, and on which a siding has been constructed for the use of the petitioner in his business." The report having

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been filed and confirmed *nisi*, the defendant company on April 26, 1884, appealed therefrom, and on the trial of that issue the rulings complained of were made.

In his instructions to the jury the learned Judge assumed the position that plaintiff was not entitled to damages for the removal of his siding and appropriation of the land on which it was located, unless they find as a fact that the natural or original surface grade of the land, on which Washington street had been located, was materially changed by cutting or filling in front of his property; that the company had a right to remove the entire artificial elevation or embankment on which his siding was laid, and thus deprive him of that means of access to his place of business, without any liability to make compensation therefor. In that portion of the charge covered by the second specification of error he says: "That siding was destroyed because it was necessarily constructed upon an embankment, made by the owner of that property, leading from the Reading railroad by an elevated track into his premises. * * * So far as it was an artificial embankment made in the street, I charge you that no excavation of it, although it did destroy the siding, would be a subject of damage in this case, because this was a regularly laid out public street; and although it had not been opened by lawful authority, no property owner along it had the right under the law to build upon it or to put any obstruction there that would interfere with the ultimate opening of the street. * * * And if the general level of the street along there as it originally existed was not altered, but after the completion of the railroad the level was about as it existed before the artificial bank which supported plaintiff's siding was constructed, there can be no recovery of damages in this case," etc.

This instruction is unwarranted by anything that appears in the record, and the error appears to pervade the entire charge, including the answers to defendant's first and fourth points. The latter is a binding instruction, that unless defendant company made an excavation or embankment in the natural grade of the plotted street fronting plaintiff's property, there can be no recovery in this suit. The other is a qualified affirmance of the first point, in which the learned Judge says: "The plaintiff can not be considered a trespasser, in the ordinary sense, because he constructed the embank-

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ment in question for his business purposes in a street laid out but not regularly opened for public travel until future legal proceedings; but he could only maintain it subject to removal whenever the public exigencies required its abatement. When the railroad company acquired the right to occupy the street, the excavation through plaintiff's artificial embankment did not make defendant responsible for damages."

Assuming the learned Judge was correct in saying that Washington street, at the point in question, was merely "laid out but not to be regularly opened for public travel until future legal proceedings," when and how did defendant company acquire the right to destroy plaintiff's siding and appropriate to its own use the land on which it was constructed without liability to make just compensation therefor? The street was located on the town plot with the view of its being thereafter regularly opened by the borough authorities for public use as a street of the borough, and not for the purpose of securing a right of way for defendant's benefit. Subject to the rights of the borough authorities, to be exercised when they saw fit to do so, the property in question belonged to plaintiff. The mere location of the street, and noting it on the borough plan, gave the railroad company no control over the land embraced within its lines. The siding and connection with the Philadelphia and Reading Railroad Company had been maintained and used by plaintiff and his predecessor in title for many years without objection from any one who had a right to interfere with his enjoyment thereof. The right of plaintiff, as owner in possession and enjoyment of the premises, is recognized by the company itself in its petition and appropriation bond filed in court; and if the trial had been conducted on that theory the errors complained of would not have occurred. Whatever may have been the right of the borough authorities, on the one hand, to open and prepare the plotted street for public use, and the right of plaintiff, on the other hand, to demand compensation for the use thus made of his property, it is very clear the defendant company has no right to locate and construct its road on the premises in question without liability to make compensation according to the terms and conditions of the bond which it tendered and obtained permission to file for his use and benefit. The assignments of error are severally sustained.

Judgment reversed, and a *venire facias de novo* awarded.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

SAMUEL R. GORDON ET AL. VS. ELIAS K. FREED ET AL.

When one of several parties who are liable for a common debt or obligation discharges the same for the benefit of all, he can call on his co-debtors for contribution.
A bill in equity will lie to enforce such contribution.

DEMURRER to plaintiff's bill.

Isaac Chism, Esq., for plaintiffs.

D. O. Rogers, Chas. Hunsicker and *N. D. Tyson, Esqs.*, for defendants.

The facts fully appear from the opinion of the court delivered September 24, 1888, by WEAND, J.

The bill in this case alleges that the Farmers' Creamery Association of North Wales, Montgomery county, Pa., a corporation incorporated under the laws of this commonwealth, became indebted for work, labor and material used in the erection and construction of its necessary buildings; that at a meeting of the stockholders the board of directors was duly authorized to borrow sufficient money to pay off the indebtedness; that the plaintiffs as directors borrowed money for that purpose upon their individual credit, under an agreement from defendants to become jointly liable with them to pay the indebtedness so incurred; that afterwards the association executed a bond and mortgage to one Jacob Swartley to secure the note given for the money so borrowed; and that upon a sale of the association's property upon said mortgage there was realized the sum of twenty-three hundred and seventy dollars, which was paid on account of said note, leaving a balance still owing thereon of eleven hundred and ninety dollars, for which the plaintiffs were personally liable, and which they with five others afterwards paid under threat of suit. This bill is now brought to compel contribution from the defendants. The bill also alleges that the corporation is insolvent and entirely without assets.

To this bill the defendants have demurred and assign as reasons therefor: That the plaintiffs have not set forth any cause cognizable in a court of equity; that the court has no jurisdiction to grant re-

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lief; and that if plaintiffs have any remedy they have a full, complete and adequate remedy at law.

The agreement referred to in the bill is as follows: "We, the undersigned stockholders of the Farmers' Creamery Association of North Wales, do hereby authorize and request the board of directors of said association to borrow a sum of money not exceeding ——— dollars, to be used for the purpose of paying off the debt incurred in the erection of the building of the association, furnishing machinery and necessary fixtures to carry on the business of said association, and for no other purpose. And we agree that the property of the association may be pledged as security for such loan; and should said directors incur any personal liability in obtaining such loan, we hereby agree to become jointly liable with them to pay such indebtedness."

The questions raised by the demurrer are first as to whether any liability exists under the above facts; and, if so, whether equity has jurisdiction to enforce the claim. The plaintiffs in making themselves liable for the debt of the association were acting by authority of the defendants. The agreement above recited expressly refers to the incurring of a personal liability which clearly meant that the loan was to be made by the directors as individuals. In everything that was done they were acting for the association and in pursuance of instructions and with the knowledge of the defendants. It would appear, therefore, that they ought to be entitled to contribution.

Mr. Bispham, in his work on the Principles of Equity, says that "the equity of contribution arises when one of several parties who are liable to a common debt or obligation, discharges the same for the benefit of all. In such a case he has the right to call on his co-debtor for contribution." In Pomeroy's Equity Jurisprudence, Section 407, the author, in speaking of the maxim "Equality is equity," says "it will apply the maxim either directly, by apportioning the burden *ratably* among all the individuals upon whom the common liability rests; or indirectly, by giving a right of *contribution* to the member of the class from whom a payment of the whole demand has been obtained, and enabling him to recover contributory shares of the amount from the other members of the class, by which means the entire burden is finally adjusted upon and among them all." He also states that the doctrine which applies to sureties also applies, and that the same remedy is given between all those who are jointly

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or jointly and severally liable on contract or obligation in the nature of contract.—Ibid, Section 1418.

In this case the indebtedness was incurred at the request of the defendants, who, by their agreement, expressly promised to become jointly liable with the plaintiffs for its payment. It would therefore seem upon every principle of law or equity that they should bear their proper share.

It being established that a claim for contribution exists, can it be enforced in equity or must the plaintiff be driven to an action of assumpsit, requiring a multiplicity of suits, delay and expense?

As early as 1800, in the case of Wright vs. Hunter, 5 Vesey, 792, it was held by the Master of the Rolls that "though contribution among partners is now enforced at law, the jurisdiction of courts of equity is not ousted." Judge Story's Equity Jurisprudence, Vol. 1, Sec. 495, lays down the rule that "originally it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them incurring such liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists. Indeed, there are many cases in which the relief is more complete and effectual in equity than it can be at law; as where there are numerous parties in interest, which would occasion a multiplicity of suits." And the same principle is asserted by Mr. Bispham, Sec. 329.

Whether regarded as stockholders, directors, sureties, or persons jointly liable, we think that equity is the proper proceeding, although the object of the suit is merely for the recovery of money. Besides, it is apparent that this is a corporation transaction, and that the individual liability assumed by the plaintiffs was done by them as directors; and therefore, as the matter relates entirely to one affecting the affairs of this corporation, our courts of equity would have jurisdiction under the powers conferred by the act of Assembly. To compel the plaintiffs to resort to their common law remedy would occasion a multiplicity of suits which it is the province of equity to prevent.

And now, September 24, 1888, the demurrer is overruled, with leave to defendants to plead or answer.

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DAVID Y. MOWDAY VS. SAMUEL M. MOORE.

In Equity. No. 1, March T., 1887. Summons case. No. 73, June T., 1887.

A suit at law to recover damages for the destruction of certain buildings will be continued for a reasonable time to enable the plaintiff to conclude a prior equity suit by which he seeks relief, which, if secured, will restore the buildings to their former full value.

RULE on plaintiff to show cause why one of the above suits should not be discontinued.

Geo. W. Rogers and *D. O. Rogers, Esqs.*, for plaintiff.

Larzelere & Gibson, Esqs., for defendant.

The facts of the case fully appear from the opinion of the court delivered October 1, 1888, by SWARTZ, P. J.

The defendant alleges that the above suits are brought for the same cause of action. If this be true, one of the actions ought to be terminated before any proceedings are had in the other. It is equally true that a bill in equity and a suit at law may be maintained for matter growing out of the same transaction; one may not interfere with the other. For example, a plaintiff may have an action of debt on a judgment, and at the same time maintain a suit in equity to restrain the defendant from disposing of his effects: Ralph vs. Brown, 3 W. & S., 399.

In the equity suit before us the plaintiff seeks redress through an injunction to restrain the defendant from flooding plaintiff's cellars and premises, caused, it is alleged, by the defendant's negligent and unlawful erection of certain buildings or foundation walls.

The suit at law alleges the destruction of plaintiff's buildings by the aforesaid flooding, and claims damages for such injuries.

The equity suit antedates the suit at law. Can the plaintiff secure by it the relief sought by the action at law? The complainant does not pray for an injunction with damages for the injury done. The equity court could have given this relief. "To prevent multiplicity of suits the court will decree an account of the damages or waste done at the same time with an injunction, and proceed to make a complete decree so as to settle the entire controversy between the parties": Allison & Evans' Appeal, 27 Penna. St. R., 227. Can the master decree this relief by reason of the complainant's general prayer? "The relief to be granted under such a prayer must not only be consistent with the specific relief demanded but must be

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sustained by the case made by the bill, and the allegations relied upon must not only be such as to afford a ground for the relief sought but they must appear to have been introduced into the bill for the purpose, and not for the purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles": Delaware and Hudson Canal Co. vs. Penna. Coal Co., 21 Penna. St. R., 146. Under this ruling it is doubtful whether the complainant can recover damages in the equity suit; but whether he can or not, he should not be allowed to recover damages at law for the destruction of the building and at the same time continue the equity proceedings by which he seeks relief, which, if secured, will restore his properties to their former full value.

Both cases are at issue, and we do not see our way clear to order either suit discontinued at this time. The equity suit is the older; and upon application by defendant for a continuance of the action at law now on the trial list, the cause will be continued for the term.

And now, October 1, 1888, the rule is discharged.

JESSE MEREDITH VS. GEORGE W. STREEPER.

A defence against a judgment is available when by subsequent payment, equitable discharge, or in any other manner either in law or in equity, the subject matter of such defence has attached to the judgment or the consideration upon which it rests.

RULE to open judgment.

George N. Corson, Esq., for plaintiff.

Larzelere & Gibson, Esqs., for defendant.

The facts sufficiently appear from the opinion of the court delivered October 1, 1888, by SWARTZ, P. J.

On the 2d day of April, 1877, the defendant executed a bill single in favor of the plaintiff for $929.25. Payments were made upon this note, and on June 10, 1885, a new obligation was given for $825, with confession of judgment, containing this proviso: "Said note to run without interest, and to be paid as I can make it off of the farm of said Jesse Meredith."

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The defendant testifies that the provision contained in the second note as to interest and payment was part of the original contract entered into when the money was loaned, and was offered to induce the defendant to leave a home where he was "well fixed" to take charge of the plaintiff's farm.

The defendant asks that the judgment be opened that he may show payment. He also alleges that he is not liable to pay the note at this time, because of his failure to make any profits on the farm.

The defendant claims that he did hauling and performed other services, for which the plaintiff was to pay him; that this claim remained unpaid and unsettled because the plaintiff always stated that credit would be given upon the note for the money so earned. The defendant is corroborated by the evidence of his wife. The plaintiff's wife, who seems to have acted for her husband in his business matters because of his age and feeble condition, denies that payment was to be made for these services except that no interest was to be paid on the note in consideration of these services.

The claim for these services and for the money expended for plaintiff's use it is alleged will discharge the note. The weight of the evidence as it now stands supports the defendant's allegation that he was to be paid for the hauling, and that the money thus earned was to be credited upon the judgment note. The language of the note corroborates the defendant in his allegation that the plaintiff was to give credit on the note when payments were made by way of services rendered. Money earned by hauling with the farm teams and farm hands is money made from the farm. Whether the defendant can escape payment so long as no profits are made from the farm need not be determined at this time; he asks leave to show payment of the judgment, and this is a defence available to him. Cardesa vs. Humes, 5 S. & R., 65; Savage vs. Everman, 70 Penna. St. R., 318.

Whether he can be allowed to show payments prior to the signing of the last note is doubtful; but if his allegations can be sustained that the new note was given only as a renewal of the old claim, and that the plaintiff always agreed to credit on settlement of this claim all moneys due for services, it would seem unjust to restrict the defence to payments made subsequent to the date of the last note.

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The offer is to show payment; there is no attempt to impeach the validity of the note. The defendant does not dispute his liability upon it. He does not attempt to put aside a written instrument. When by subsequent payment, equitable discharge, or in any other manner either in law or equity, the subject matter of defence has attached to the judgment or the consideration upon which it rests, the defence is available: Harper vs. Kean, 11 S. & R., 280; Beaty vs. Bordwell, 91 Penna. St. R., 441. Whether the defence will prevail a jury can best determine upon the production of all the evidence.

And now, October 1, 1888, the judgment is opened and an issue is awarded to determine whether anything has been paid upon the note, and what balance, if any, is still due upon the judgment, the lien of the levy to continue.

E. L. ACKER, TO USE OF LEWIS STYER, VS. MATTHEW LAMBERT.

A judgment confessed by a client to his attorney will only stand as security for what is actually due, and on an allegation of fraud in obtaining the same the judgment will be opened and the defendant let into a defence.

The burden of establishing its fairness, adequacy and equity is thrown upon the attorney.

RULE on application of defendant to open judgment.

Larzelere & Gibson, Esqs., for rule.

E. L. Hallman and *Freas Styer, Esqs.*, contra.

The facts appear in the opinion of the court delivered October 1, 1888, by WEAND, J.

If this was an ordinary case of debtor and creditor, we would be obliged to dismiss the rule granted, for reasons so often repeated by this court in a number of cases recently decided.

It is, however, a proceeding between counsel and client where different rules prevail. As was said by Lord Chancellor Lougborough in Newman vs. Payne, 2 Vesey, Jr., 200: "Attorneys are officers of the court, and have several privileges as such; and there are summary proceedings for and against them, and peculiar restraints on them in their dealings with their clients both at law and equity; at law a judgment obtained by an attorney from his client

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would only stand as a security for what is actually due." In Darlington's Appeal, 5 N., 512, Mr. Justice Trunkey said: "An act or contract, though not originating in any evil design or contrivance to injure another, yet tending to deceive and mislead, or violate private confidence, is a constructive fraud, equally reprehensible with actual fraud, and prohibited by law. Constructive fraud often exists where the parties to the contract have a special confidence or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over the other. A transaction between persons so situated is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party. Owing to the near connection between the parties in many relations, the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious. For instance, the relation between attorney and client gives rise to great confidence, and to very strong influences by the attorney over the actions, rights and interests of his client. The attorney is presumed to have the power to gain by the necessities, good nature, liberality and credulity of his client, and to obtain undue advantages, bargains and gratuities. Hence the law often interposes to declare transactions between them void, which between other persons would be unobjectionable. The principle that while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former, supersedes the necessity of any inquiry into the particular means, extent and exertion of influence in a given case, a task often difficult and ill supported by evidence, which can be drawn from any satisfactory sources. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and on the other hand, it is not necessarily void throughout *ipso facto*. But the burden of establishing its perfect fairness, adequacy and equity is thrown upon the attorney. If no such proof is established, courts of equity treat the case as one of constructive fraud."

We have cited liberally from the above opinion because it would seem to govern the case before us so far as to require us to open this judgment and let the defendant into a defence. The testimony sub-

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mitted is contradictory, and is oath against oath. We are now only passing upon the legal aspect of the case as presented to us by the affidavits, and purposely forbear from reviewing the testimony or expressing any opinion upon the merits, in order that the case may not be prejudged before trial.

And now, October 1, 1888, it is ordered and decreed that the judgment heretofore entered in the Court of Common Pleas of Montgomery county, in Judgment Docket M 1, page 495, in favor of E. L. Acker, to use of Lewis Styer, vs. Matthew Lambert, for $500, be now opened and the defendant let into a defence; and that an issue be framed therein in which the said E. L. Acker, to use of Lewis Styer, be the plaintiff and Matthew Lambert the defendant, to determine how much, if anything, is due on said judgment from said defendant to said plaintiff. All proceedings on said judgment to stay in the meantime, and the lien of the levy or attachment to remain.

CHARLES BUCKWALTER VS. WILLIAM S. ESSICK.

Where an agent sells the property of his principal, takes a note for the purchase money in his own name, discounts the note, and accounts to his principal for the proceeds of the sale, he risks the solvency of the parties to the note unless he discloses to his principal all the facts and circumstances attending the transaction.

A full knowledge of all the material facts and circumstances attending the transaction is necessary to give validity to a ratification.

REASONS for new trial.

Henry M. Brownback, Esq., for rule.

Larzelere & Gibson, Esqs., contra.

The facts fully appear in the opinion of the court delivered September 24, 1888, by SWARTZ, P. J.

The charge in this case was as favorable to the defendant as the facts and papers in evidence warranted. We fail to see how the jury could have reached any other conclusion than that expressed by their verdict.

The defendant evidently relied upon the financial standing of the makers of the note given for the purchase money, and failed to take the necessary steps to indemnify himself against loss. He assumed a risk which his principal might have undertaken if all the

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facts and circumstances had been disclosed to him when the money was paid over. The agent settled with his principal, accounted for the property placed in his hands to sell, and paid over the money. The relation of principal and agent terminated. When the money was paid not a word of intimation was given that the principal assumed any liability in accepting it. The principal knew that a note was discounted, but was not informed who gave the note, who endorsed it, or upon what terms it was taken. The agent failed to state that he had endorsed the note, and no fact or circumstance was given from which the principal might infer that the agent had assumed a liability in securing the money.

The agent negotiated the note in his own name; he had it discounted for his own use, so far as the principal was concerned. If the agent did not wish to risk the solvency of the parties to the note, he should have passed it over to his principal or informed him of all the facts and circumstances attending the transaction. Porter vs. Zeitinger et al., 1 Penny, 505.

The payment of the money to Buckwalter after the sale made by the agent, with a full knowledge of all the circumstances, was an assumption by the agent of any liability upon the note. Oakley vs. Crenshaw, 4 Cowen, 250.

Now that the makers of the note failed, and the agent finds that he must lose, it is too late to shift the liability and ask the principal not only to lose all the property put into the agent's hands but also pay an additional sum of $250. The principal was kept in the dark, and the matter was settled and ended. One of the first duties of an agent is to make full disclosures to his principal if he intends to claim the protection of the principal.

It is claimed that after the note was protested full disclosures were made, and that the principal then promised to indemnify the agent against all loss. The defendant had the full benefit of this evidence. The rule is well settled that a full knowledge of all the material facts and circumstances attending the transaction is necessary to give validity to the ratification, and the party must know that he would not be liable without such ratification: The Pittsburg Railroad Co. vs. Gazzam, 32 Penna. St. R., 348; Hinely vs. Margantz, 3 Id., 428. The jury must have found that the plaintiff did not promise to indemnify the defendant, or that such promise was

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not made with that knowledge of the facts and circumstances necessary to constitute a ratification.

It is questionable whether this part of the charge was not too favorable to the defendant. The transaction between the plaintiff and defendant was settled and ended when the money was paid; the loss by the defendant was incurred through his own fault. There was no moral obligation upon the plaintiff to make good the loss that will support a promise to pay. A promise to pay by one not liable will not add to his liability. Lincoln vs. Wright, 23 Penna. St. R., 80.

There was no question of ratification in aid of third parties. It is not claimed that the bank which discounted the note had any claim upon the principal by reason of any ratification of the agent's acts. All that was claimed upon the trial was a promise by Buckwalter to make Essick whole.

It is a hardship upon the defendant to lose this money, but it would be a greater hardship to ask the plaintiff to lose it when he is without fault in the transaction.

And now, September 24, 1888, the motion and reason for a new trial are overruled.

IN EQUITY.

JOHN K. REID VS. EZEKIEL ANDERSON.

The finding of facts by a master in equity will not be disturbed unless clearly unwarranted by the evidence.

Whether a dam across a creek unlawfully swells back the water over lands of an adjoining owner, is a proper subject of inquiry in a court of equity. While the remedy at law may be adopted, it will give place to the adequate and concurrent remedy in equity which suppresses interminable litigation and multiplicity of suits.

No one can set up an estoppel unless he is affected by the act which he alleges constitutes the estoppel.

EXCEPTIONS to the report of F. G. Hobson, Esq., master in equity.

F. P. Hale Jenkins and *N. H. Larzelere, Esqs.*, for defendant, the exceptant.

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Chas. H. Stinson and *C. Henry Stinson, Esqs.*, contra.

The facts are fully disclosed in the opinion of the court, delivered May 7, 1888, by SWARTZ, P. J.

A careful examination of the master's report convinces us that the facts found by him are fully sustained by the testimony. The evidence clearly shows that the plaintiff's land is flooded by the back water of Croton creek, occasioned by the dam erected by defendant in 1874. The defendant shows by his own testimony that he swelled back the water by the erection of this dam beyond the extent he and those under whom he claims title had the right to flood plaintiff's land. The master finds that the height of the dam was not materially changed after its erection in 1874. He could have gone a step farther and found with safety that this dam was raised after 1874. Long, the plaintiff's tenant, swears positively that defendant told him the dam was raised six inches. The witness is corroborated by defendant's workman, who says he heard this declaration by defendant. This theory is corroborated by the condition of plaintiff's land above the dam. How can we otherwise account for the subsequent increased back water, and increased area of land rendered unfit for agricultural purposes because water-soaked? The dam may have raised the water within the confined banks of the creek, and thus injured the land by percolations. The testimony shows the soil is of a character allowing such percolations. It matters not whether the damage is occasioned by the overflow of or the percolations through the natural banks, so long as the result is occasioned by the improper interference with the natural flow of the stream. Angel on Water Courses, Sec. 330; Pixley vs. Clark, 35 N. Y., 520.

Assuming, then, that the master is right in his finding of facts that the water was swelled back by the erection of the dam in 1874 beyond the extent and distance the defendant had a right at that time to back it, can the bill be sustained?

The defendant claims that the statute of limitations is a bar to the proceedings. The right to have the water flow in its natural and prescriptive course is not lost until after twenty-one years of undisputed interruption. The obstruction of the stream is equivalent to a continuing nuisance to all who may be injured by it. Stout vs. Kindt, 24 Penna. St. R., 452.

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It is also contended that there is no equity jurisdiction to give plaintiff relief, because of the adequate remedy he has at law. The master has fully considered and answered this point. Law and equity exercise concurrent jurisdiction in such cases. Equity is the proper remedy or perhaps the better process, because it suppresses oppressive and interminable litigation and prevents multiplicity of suits. The inadequate remedy at law gives place to the adequate and convenient remedy in equity. Kirkpatrick vs. McDonald, 11 Penna. St. R., 387; Appeal of the Brush Electric Light Co., 6 Central Reporter, 129.

Numerous cases can be cited from the courts of our state in which the common law remedy was adopted, perhaps because we are so loath to give up jury trials. These same cases give ample proof of the inadequacy of the remedy used. Take, for example, the case of Casebeer vs. Mowry, 55 Penna. St. R., 419. This was an action for the continuance of a nuisance by flooding plaintiff's land. The plaintiff in his suit recovered nominal damages, and the defendant reduced his dam. The plaintiff, not content, brought a new suit, and lost; the case was sent back for retrial, but how the matter was finally ended does not appear. The result of the first suit disclosed that the dam was too high—nothing more. An equity suit would have determined the rights of the respective parties and fixed them definitely for all time. The case at bar is a proper subject for equity jurisdiction. The defendant is clearly entitled to swell back the water on plaintiff's land for some distance, and that each party may know his exact rights equity should give the relief and avoid a multiplicity of suits which in the end fail to determine definitely the exact rights of the parties.

The defendant alleges that the plaintiff is estopped by reason of his acts and conduct, and by the acquiescence of Adams, the former owner of plaintiff's property.

It seems this point was not raised before the master, and we are not favored with his views under the facts as he might have found them. The dam was built in 1874, during Adams's ownership. Reid bought in 1876. The defendant argues there was acquiescence, because Adams gathered ice from the pool formed by the dam. A careful examination of the testimony will show that Humes and Long, the tenants of Reid, gathered ice from the pond from 1876 to 1880, and perhaps later. One of the defendant's witnesses says Long

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did not take ice the next year because he could not have the first crop, but there is no testimony showing that Adams at any time took ice from this pool.

It does not appear that Adams made any objection to the dam for the two years he continued on the premises now owned by plaintiff, but it is also shown that the injurious effects of the dam were not fully manifested during Adams's tenancy. The channel on plaintiff's land necessarily widened by reason of the large pool of water stored and the constant wearing away of the sides of the channel at the point of entrance to the pond. Such widening of the channel on plaintiff's premises may have caused freer percolation of the waters and greater injury to the soil about the pool. It is clearly shown that land tillable as late as 1879 could not be farmed in later years. This was due to the causes just given or to the subsequent increased height of the dam.

Under either view the acquiescence of Adams for the two years is of little consequence in this case. Defendant claims that Adams stood by and saw extensive improvements made and expenses incurred, and yet remained silent. What were these improvements? Not the changes made in the distribution of the water at the barn, for the dam was built to form an ice pond—not to give greater fall to conduct the water to the barn.

The new water ditch takes its supply at a point one hundred feet below the dam and *from the old ditch*, thus showing that the new water distribution could have been made with the old dam as well as with the new; at least, this is the contention of the defendant. The expensive improvements referred to by the defendant can therefore relate only to the stone wall some few feet high built across this little creek.

Adams was not compelled to rush into litigation with his neighbor; certainly not before he was fully convinced that the dam did him injury. If his conduct can be construed into a license to maintain this dam, what becomes of the protection secured to land owners which provides that twenty-one years of peaceable user are necessary to ripen a user into a legal right? If the expenditure of a few dollars on defendant's property, without immediate objection from plaintiff, because he may not fully know the extent of the injury done by such expenditure, can establish an easement on plaintiff's property, what security is there in our titles? All that is alleged

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against Adams is his silence; but silence will not estop unless it is fraudulent. Robinson vs. Justice, 2 P. & W., 23; Lawrence vs. Lahr, 65 Penna. St. R., 241; Hill vs. Epley, 31 Id., 334. If the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. Hill vs. Epley, *supra.* Adams and Anderson each had equal means of knowledge; each knew that he had no right to swell water upon the other without a license to do so. There was nothing done by Anderson that called upon Adams at that time to break his silence. Anderson, although he violated his license acquired by user, did not at any time assert the right to back water on the Adams property beyond the extent he had been accustomed to swell it prior to 1874; he does not even now claim any such right, but denies that he did it.

The fact that Reid or his tenants took ice for several years from this pond does not estop plaintiff from demanding that the dam shall be reduced so as to do him no further injury. There is no allegation that defendant claimed a license to swell back the water as a compensation for ice furnished to plaintiff. On the contrary, defendant's witness shows that the right to take ice was denied until defendant was supplied. Defendant claimed the first crop, and did no more than conform to the usual custom among neighboring farmers; that is, to allow the removal of such ice free of charge as the owner did not need for his own use.

How can these acts of the plaintiff estop him? What has the defendant done in consequence of them? The dam was built two years before any ice was taken, and it does not appear that the defendant expended a dollar on it after 1876 or made a single change in its construction or the distribution of the water at the barn. He was not misled by the plaintiff, and he can not say that a single act was done in consequence of or in pursuance of plaintiff's conduct. No one can set up an estoppel unless he is affected by the act which he alleges constituted the estoppel. Diller vs. Brubaker, 52 Penna. St. R., 498. It must be shown that the act misled the defendant. Allen vs. Allen, 45 Penna. St. R., 473.

We approve of the master's findings both as to the facts and the law, but we can not adopt his decree; it is too uncertain and vague. One of the strongest arguments in favor of equity jurisdic-

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tion in this case is the certainty and clearness of the rights of the respective parties fixed by a proper decree. The master, however, did the best he could under the circumstances; the plaintiff failed to furnish testimony necessary for a more definite decree. The matter is referred back so that the master may take testimony enabling him to find accurately the proper height of the dam or extent of the pool, and by reference to some stone or other fixed land mark enable the parties at all times to verify this height, and thus avoid future litigation.

IN EQUITY.

FRANK H. BOLTON ET AL. VS. JAMES S. SWARTZ, OWNER, AND THE STONY CREEK IRON COMPANY (LIMITED), LESSEES, AND THE LUCINDA FURNACE COMPANY.

Equity will exercise jurisdiction where the complaint charges injuries and threatened injuries arising from an unlawful interference with a water course. The inadequate remedy at law gives place to the adequate and convenient remedy in equity. The equity proceeding prevents a multiplicity of suits and fixes accurately the rights of the respective litigants.

DEMURRER and plea to the jurisdiction of the court.

On a rule for a preliminary injunction this case was reported in 3 MONTGOMERY COUNTY LAW REPORTER, 191; and on a rule to set aside service in 4 Id., 9.

Larzelere & Gibson, Esqs., for complainants.

Henry Freedley, Esq., for James S. Swartz, one of defendants.

The facts sufficiently appear from the opinion of the court delivered September 24, 1888, by SWARTZ, P. J.

The defendant, James S. Swartz, has filed a plea to the jurisdiction of the court, alleging:

1st. That the service is irregular and void.

2d. That the bill is an ejectment bill, and can not be entertained in a court of equity.

The defendant, the Stony Creek Iron Company (Limited), lessees, filed a demurrer on the ground that there is no jurisdiction to

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entertain the bill, and also pleads in abatement alleging that a bill was filed June 20, 1888, for the same cause of action given in the bill filed September 30, 1887.

The question as to the regularity of the service, as well as to the order for service, was disposed of by this court upon the motion of the defendant to set aside the service.

The paper filed June 20, 1888, was presented to the court as an affidavit upon which to found a preliminary injunction. We so treated it, and it should have been filed as such. If the record fails to disclose this fact, it should be amended. As no bill was filed June 20, 1888, we can not sustain the plea in abatement.

The only other question raised by the pleas relates to the jurisdiction of the court. The defendants allege that the bill is an ejectment bill, and can not be entertained in an equity court.

We can not agree with the defendants that this is an ejectment bill. The plaintiffs do not seek to recover land in the possession of the defendants, but complain of the injuries and threatened injuries arising from an improper interference with a water course. This is a matter clearly within the province of equity jurisdiction. Angell on Water Courses, Sec. 445, 447. The equity proceeding prevents multiplicity of suits. Scheetz's Appeal, 35 Penna. St. R., 88. The inadequate remedy at law gives place to the adequate and convenient remedy in equity. Kirkpatrick vs. McDonald, 11 Penna. St. R., 387; Appeal of the Brush Electric Light Co., 6 Cent. R., 129. A decree in equity will fix accurately the exact rights of the respective parties.

It may well be that the plaintiffs' prayer is too sweeping; they may not be entitled to relief co-extensive with their prayer. But if the defendants are depositing ashes, dirt or cinder into the creek unlawfully, so as to injure the plaintiffs and threaten destruction to their works, the court must interfere and stop such unlawful deposits; nor can the defendants complain if directed to remove from the creek the deposits unlawfully made by them. If the plaintiffs can establish the truth of their allegations they are clearly entitled to relief in an equity court.

And now, September 24, 1888, the demurrer and pleas of the defendants are overruled.

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HENRY SCHWENK vs. CONRAD A. MILLER.

In order to entitle plaintiff to judgment for want of an affidavit of defence, his claim must on its face show a clear right to judgment; and if it requires proof to sustain it, no judgment can be entered thereon.

In a suit against *Conrad A. Miller* the statement filed showed entries against *A. C. Miller*. *Held*, that as it required proof that they were the same persons, judgment by default could not be entered.

SUR RULE for judgment in default of affidavit of defence.

Wm. F. Dannehower, Esq., for rule.

Bickel & Hobson, Esqs., contra.

The facts appear in the opinion of the court delivered September 17, 1888, by WEAND, J.

Without passing upon the question as to whether the defendant's affidavit was filed in time, we think it clear that plaintiff's motion must be denied. Plaintiff's claim must on its face show a clear right to judgment. If it requires proof to sustain it no judgment can be entered thereon. Wall vs. Dovey, 10 P. F. S., 212.

This suit was brought against Conrad A. Miller, but the statement filed shows book entries against A. C. Miller. How is the Prothonotary or the court to know that by A. C. Miller the defendant was intended, no such averment appearing in the statement? Clearly, if this case was before a jury, the plaintiff would be driven to proof of this fact before the account would be received in evidence.

The account shows an indebtedness of $1376.43, with no credits. In his statement plaintiff claims only a balance of $400, without averring that that is the amount which he believes is justly due to him from the defendant. Gould & Co. vs. Gage, 3 Crummie, 559. For these reasons, especially the first, we think the plaintiff is not entitled to judgment.

And now, September 17, 1888, the rule for judgment is discharged.

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HAMPTON VS. BOROUGH OF BRIDGEPORT.

Parents who allow a young child to go alone and unprotected upon the public streets, near a place of known danger, are guilty of negligence.

The fact that a young child who has parents is found alone and unprotected in the street is presumptive evidence that he was so exposed, voluntarily or negligently, by his protectors: and that as their negligence contributed to his injuries, they can not recover for loss of service.

MOTION to take off non-suit.

Theo. W. Bean and *F. L. Murphy, Esqs.*, for plaintiffs.

J. P. Hale Jenkins and *Henry C. Boyer, Esqs.*, for defendant.

The facts are fully disclosed in the opinion of the court delivered December 3, 1888, by WEAND, J.

This action was brought by plaintiffs to recover damages for the loss of their child by reason of the negligence of the defendant in not keeping its streets in proper condition.

Depot street, in the borough of Bridgeport, ends abruptly in the canal of the Schuylkill Navigation Company. At the time of the accident no barrier or other guard had been erected at the end of the street. The child, about four years old, was drowned by falling into the canal, and was found a few feet distant from the mouth of the sewer which is built beneath the surface of the street. No one saw the accident. At the conclusion of plaintiffs' testimony the court, on motion of defendant, entered a compulsory non-suit upon the ground of contributory negligence on the part of the parents. The plaintiffs now move to take off the non-suit, and allege as a reason that the question of contributory negligence should have been left to the jury. The house of plaintiffs is on Front street near Depot, and not far from the scene of the accident.

The evidence upon which the court granted the non-suit is as follows:

Ellis R. Hampton, the father, testified, p. 3: "My wife and I did not either of us allow the child to go away from the front of the house; when we found or heard that he was away from the front of the house we always went after him and fetched him back. Our rules were to try to keep him as close to the house as we could. There are grape arbors in the yard of our house and this child was a great child for climbing, and therefore we used to think it was safer

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to have him on the front step than it would be in the yard. My authority to the child was to be in the day time on the front step and in front of my house. He would go down to this corner to play generally, but we did not allow him to stay there. I have seen him playing on Depot street, and when I saw him there I would fetch him home and correct him." When he heard the boy was missing he says, p. 4: "I went down to the corner and made inquiry at the corner of Front and Depot streets, and the first information I got that he had been on the street gave me the idea that he had gone to the canal." "I whipped the child for being on Depot street about two months before the accident." P. 7: "I consider that particular place dangerous, for there is an inducement for children to go down there, and there is nothing to protect them, if they get playing around the edge, from falling over into the water."

Mrs. Hampton, the mother, testifies, p. 12: "I always allowed him to go out on the front pavement to play, but not to go out of my sight. On June 23, 1886, the last I saw of my child, was when he went out of the alley on to the front pavement about a quarter-past two in the afternoon. It was after my husband came home before I made inquiry for the child. He came home at half-past three." Cross-examined, p. 13: "I did not tell the child to go out in the street. I saw him go, and did not tell him not to. He was pretty generally on the front pavement. I have seen him on Depot street. I can not say frequently. I have seen him there occasionally."

Mrs. Fisher, p. 18: "I frequently saw him playing down there at Mr. Booth's stable" (near the canal).

Mr. Booth, p. 20: "I saw that boy very frequently about my stables." P. 22: "He was there very frequently; daily; continually." P. 24: "This child was there very frequently. I often saw him there in the forenoon. Nobody ever took him away to my knowledge."

Mrs. McArthur, p. 35: "I saw that child there on Depot street almost every day." P. 36: "I saw that child there daily, not for a whole afternoon at a time, but I saw him there a long time playing. I have seen him there for an hour and over an hour frequently." P. 37: "The child was daily at this place. I have seen him in the morning, in the afternoon, and in the middle of the day. It was a kind of play-ground. There was no person around playing but himself; he was left to run alone."

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If this evidence shows contributory negligence on the part of the parents, the court properly granted the non-suit. Did it show such negligence on the part of the parent as would prevent a recovery?

In Glassey vs. The H., M. & T. Pass. R. W. Co., 7 P. F. S., 172, an action for damages in causing the death of a child about four years old, the defendant submitted the following points: 1. Knowingly to allow a child of less than four years of age to go at large in the public street without a protector is such negligence in his parents or guardians as will prevent the parent from recovering in an action brought by him for loss of services by reason of injuries to such child. 2. The fact that a young child who has parents is found alone and unprotected in the street is presumptive evidence that he was so exposed, voluntarily or negligently, by his protectors; and that, as their negligence contributed to his injuries, they can not recover for loss of service. 3. If a child of less than four years of age is allowed to go at large in a public street, without being under the immediate charge of a competent person, and if it does not appear that the said child was suitably guarded and restrained from going into the street, then the parents can not recover for loss of service.— The court below declined to affirm these points, and a recovery was had. The Supreme Court reversed the judgment, and said the points submitted to the court below should have been affirmed.

Applying the above principles to the case at bar the non-suit was properly entered. Under the plaintiffs' own testimony the child was allowed to go upon the street unprotected almost daily, and to play at this dangerous point, which was almost within sight of his home.

It is no answer to say that the child was told not to go upon the street and to confine himself on the front steps, in face of the testimony that he daily violated this injunction and did play, alone and unprotected, at or near this place of danger. As was said by Judge Strong in Glassey vs. Hestonville, *supra:* "A father has no right to expose his child to such danger; and if he does, he fails in performance of his duty and is guilty of negligence."

In this case the facts were undisputed; and as they disclosed negligence on the part of the plaintiffs, there was nothing to submit to the jury.

And now, December 3, 1888, the motion to take off the non-suit is overruled.

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Orphans' Court of Montgomery County.

Estate of Louisa Rittenhouse, Dec'd.

The Orphans' Court is the proper forum to settle disputes between several claimants to the same legacy in the hands of the executor.

Where the petitioner alleges that a legacy vested in him by agreement with the legatee for a consideration, the Orphans' Court will appoint an auditor to make distribution of the funds in the executor's hands.

Exceptions to account and petition for auditor.

Theo. W. Bean, Esq., for exceptant.

B. E. Chain and *Franklin March, Esqs.*, contra, for accountant.

The facts are fully disclosed by the opinion of the court delivered December 3, 1888, by Swartz, P. J.

Benjamin Rittenhouse, a brother of the testatrix, asks for the appointment of an auditor to make distribution of the funds of said estate. The executor resists the appointment of such auditor upon the application of the petitioner, on the ground that Benjamin Rittenhouse has no interest in the estate, either as legatee, devisee, creditor, or otherwise. The petitioner alleges that he has an agreement with the executor and legatees, under which a portion of the estate is due and payable to him. He claims that certain legacies are in part payable to him.

The Orphans' Court is the proper forum to settle this dispute between several claimants upon the same funds in the executor's hands.

The petitioner does not contend that the money he claims is not a part of the testator's estate.

The act of 13th April, 1840, authorized the Orphans' Court to appoint auditors on the application of the creditors as well as of executors and administrators, and on the application of legatees, heirs, or other persons interested, to make distribution of the estate in the hands of the executors and administrators to and among the persons entitled to the same.

"The power to decide all questions necessary to a proper distribution of the fund follows the power of distribution, and vests in the Orphans' Court as a necessary incident to the jurisdiction": Dundas' Estate, 73 Penna. St. R., 480. So in Shollenberger's Appeal, 21 Penna. St. R., 341, the court held: "It is very clear, there-

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fore, that the Orphans' Court in a proceeding to distribute an estate among legatees next of kin and heirs has ample power to inquire into and determine all questions standing directly in the way of a distribution to these parties."

Where two persons claim the same legacy, one by assignment, the other by virtue of an attachment execution, the Orphans' Court by proceedings in distribution will determine the controversy: Lex's Appeal, 10 W. N. C., 209. It was said in this case: "It is not only over the person of the claimants that the Orphans' Court has jurisdiction but also over the fund. It alone can order its distribution. This necessarily gives it power to hear and determine all questions arising in the distribution." Benjamin Rittenhouse claims the interest in the legacies by an agreement with the legatees. If such agreement is founded upon consideration, his title to the legacies is as valid as under an assignment or attachment.

The argument of counsel discloses that there are certain written papers under which the petitioner claims a share in the legacies; and where a paper thus stands in the way of distribution, and there are two claimants to the same legacy or share of it, the jurisdiction of the Orphans' Court necessarily attaches in order to remove the barrier to the payment of the legacy. Otterson vs. Gallagher, 88 Penna. St. R., 355.

We do not see how the executor can safely make distribution until the questions raised by this petitioner are determined; and an auditor can take the testimony of the parties and determine the title to the fund in the accountant's hands and make distribution accordingly. An auditor will be appointed to make the distribution prayed for.

Court of Quarter Sessions of Bradford County.

COMMONWEALTH VS. WILHELM.

In order to convict a defendant of a violation of Section 17 of the act of May 13, 1887, prohibiting the furnishing of liquors to persons of known intemperate habits, it is necessary to prove that the defendant knew of the intemperate habits of the person to whom the liquors were furnished.

It seems that buying liquor for a person of known intemperate habits is furnishing it, within the meaning of Section 17 of the act of 1887.

INDICTMENT for furnishing intoxicating liquor to persons of known intemperate habits.

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Commonwealth vs. Wilhelm.

When this case came on for trial, the defendant, by his attorneys, admitted that on July 31, 1888, at the borough of Canton, in Bradford county, the defendant met one Henry Wright on the street, who gave defendant a pint bottle and twenty-five cents in money and requested him to go to a certain hotel and get him the bottle filled with whisky; that defendant took the bottle and money and went to the hotel and got the whisky, and returned with it to Wright and gave it to him, and Wright, with some others, drank it; that at the time Wright was a person of known intemperate habits. It was not admitted that defendant knew anything of his habits.

J. A. Wilt, Esq., for Commonwealth.

McPherson & Angle, Esqs., for defendant.

The charge of the court was delivered at September T., 1888, by ARCHBALD, P. J., of Lackawanna district, specially presiding.

Gentlemen of the Jury—The defendant's counsel have admitted certain facts, and therefore, there being no other evidence in the case, request us to instruct you that the defendant is not guilty. The first suggestion is that there was not a furnishing within the meaning of the act of Assembly upon this subject. I hesitate about making a decision to that effect. It seems to me if I should declare that this was not a furnishing, it might lead to the evasion of the law, and it is a question whether a person who should lend himself to obtaining liquor for a person of known intemperate habits in this way would not be amenable to this statute.

It is quite broad in its terms, and while we should not strain at a construction which will make an act criminal, we should not allow evasions to creep in which would avoid the intended effect of the statute.

But, again, the defendant's counsel urge that the evidence does not show that it was known to the defendant that Henry Wright was a person of intemperate habits. To my mind, when the statute says that liquor of this kind shall not be furnished to a person of known intemperate habits, it means not only that he is known to the community generally to be such a person but that the defendant knew of these intemperate habits. And as it is not admitted in the statement of the counsel that the defendant knew Henry Wright to be a person of intemperate habits, and the District Attorney has no evidence to

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show that he did know it, I instruct you to return a verdict of not guilty.

Verdict, not guilty.

Court of Common Pleas of Montgomery County.

CHARLES F. GARNER VS. THE NORTH WALES MUTUAL LIVE STOCK INSURANCE CO.

Where the board of appraisers of an insurance company fixes the value of a horse insured in the company, such appraised value to continue for one year under its by-laws, and the horse is taken sick within the year and dies of the sickness after the expiration of the year, the company is liable for the value of the horse as of the time when he was taken sick of the disease whereof he died; and said value is fixed by the appraisement made as aforesaid, unless the insured by his act or conduct has waived his right to such appraised value.

MOTION for new trial.

Theo. W. Bean, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

The facts of the case fully appear from the opinion of the court delivered December 3, 1888, by SWARTZ, P. J.

The plaintiff's horse was insured in the defendant company. In the latter part of the year 1885 the company fixed the insured value of the horse at one hundred dollars. On New Year's day following the horse was taken sick with fits or staggers, and grew worse and worse from month to month. In January, 1887, the veterinary surgeon gave a certificate that the horse was worthless and incurable, and thereupon the company ordered him killed. Under the by-laws of the company, a horse appraised by the board, as was done in this case in the latter part of the year 1885, stands insured in case of loss for the full amount of such appraisement or valuation for the ensuing year. The insurance continues even beyond this term; but in case of loss the company determines the value of the animal by a new appraisement. The undisputed testimony shows that the horse in this case was killed by reason of the sickness he suffered from in January, 1886, and continued to suffer from without interruption to the day he was killed.

We instructed the jury that the plaintiff was entitled to recover the value of his horse as of the time he was taken sick with the ail-

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ment whereof he died, unless the plaintiff had waived this right by anything that took place between himself and the defendant company. In the judgment of the court the case turned upon this question of waiver. The company claimed that the plaintiff by his acts and conduct forfeited his title to the appraised value of one hundred dollars and was confined to the value fixed by the board of appraisers in November, 1886, a time when the horse, according to the surgeon's evidence, was incurable and of little or no value.

The conversations between the President of the defendant company and the plaintiff, and the subsequent conversations between the plaintiff and the board of appraisers and Secretary of the company, were all given to the jury. These facts and circumstances were fairly submitted in the charge of the court, and the jury was to determine whether the plaintiff should recover the value of a well horse or the value of a horse nearly dead with disease.

Counsel for defendant complains because the court said to the jury, "Therefore you will say whether the President of the company did not have some knowledge of the character of the disease of this horse." This submission in the manner it was given is fully justified by the evidence. The plaintiff says, in June he reported the horse to the President of the company, who told him to get a doctor. The President says he told plaintiff to get a horse doctor and secure a certificate if the horse was bad,—that is, a certificate to kill the horse. The President went up the following day and examined the horse. The plaintiff later on called again on the President, explaining there was something wrong with the horse; again the officer went up and saw the horse, and Garner explained to him the actions of the animal, being such as are usually found in horses suffering from staggers or fits. Surely, where the evidence shows four distinct interviews between plaintiff and the President of the company about the disease of the horse, in one of which the officer of the company, after the symptoms of the disease were given, recommended a course of treatment, the court was justified in saying to the jury "you will say whether the President did not have some knowledge of the character of the disease of this horse."

The answer to the defendant's third point was as favorable to the company as it was entitled to.

We find no valid ground for a new trial.

And now, December 3, 1888, new trial refused.

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EDWARD C. WOOD VS. PERTH AMBOY TERRA COTTA CO.

Where a judgment is opened generally the burden of proof to show consideration is on the claimant under the judgment.

Money loaned to an individual member of a firm does not become a firm debt unless used in the firm's business with the knowledge or consent of the other partners.

G., a member of a firm, deposited the firm's money in his own name. He borrowed money in his own name and deposited to the same account. This did not raise a presumption that the borrowed money was used for the firm so as to bind the other partner.

ISSUE, sur motion for new trial.

Joseph Fornance, Esq., for plaintiff.

Montgomery Evans, Esq., for defendant.

The opinion of the court by SWARTZ, P. J., on opening the judgment and awarding the issue, is reported in 3 MONTGOMERY COUNTY LAW REPORTER, 115.

The facts sufficiently appear in the opinion of the court delivered December 3, 1888, by WEAND, J.

The President Judge of this court in his well considered opinion has so well covered every argument used in support of this motion that but little more need be said to sustain both the opening of the judgment and the rulings of the court on the trial.

On the first branch of the issue as to the existence of a partnership the evidence was full and conclusive. The admissions and declarations of Green made in the presence of Wood, the procuring of the lease, the representations made to Bradstreet's agency, the letter-book and other facts, abundantly established this fact. The only evidence against it was the letter-book, which can scarcely be considered contradictory, as both Wood and Green used it, and therefore the letters contained in it rather prove than disprove the partnership.

The only evidence bearing upon this point which was offered and rejected were the declarations of Green made in the absence of Wood, which were clearly not competent. What he said publicly against himself and in favor of Wood would be competent, whilst those made in favor of himself and in the absence of Wood could not be received. Green being dead, the witness who was offered to prove this matter of defence was properly rejected, both because of Green's death and because of its incompetency even if he had been

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living. This was not the case of a dormant partner who allowed another to hold himself out as the real and only owner, as in Collender vs. Robinson, 96 Penna. St. R., 454, but the bill and letter-heads used by Green, and all his dealings as "The Ardmore Wood Working Co.," gave notice that should have put others on inquiry before dealing with him as an individual. As this issue was framed, there was nothing to submit to the jury upon the question of partnership, there being no disputed testimony. On the second branch of the issue as to the amount due on the judgment by the firm, the burden of proof was on the defendant (plaintiff in the judgment).

Where a judgment is opened generally the burden of proof is as in other cases: Dennison vs. Leech, 9 Penna. St. R., 164; West vs. Irwin, 74 Id., 258; Collin vs. Freas, 77 Id., 493.

There was no evidence in the case which would bind the firm. It was Green's debt, and Wood was not liable for it or any part thereof. There was no evidence that the money went into the firm's assets with or without the consent of Wood; certainly not with his knowledge or consent. The fact that Green kept the firm's money in his individual bank account did not raise such presumption, and was not evidence from which the jury could infer that Wood knew that Green was using it for any other than his individual purposes. The rejected offers of testimony on this point went no further than to establish the fact that an individual bank account had been kept, and from this it was claimed the jury could infer that Wood knew that the money was used in the firm. That this evidence was insufficient is shown by Donnelly vs. Ryan, 5 Wr., 306; Book vs. Evans, 5 Watts, 200. In the trial of an issue the evidence must be restricted to the issue: McMurray vs. Erie, 59 Penna. St. R., 223, and all of the rulings of the court on the trial were in conformity with this principle.

And now, December 3, 1888, a new trial is refused.

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MILTON M. GODSHALK vs. JACOB H. BAILEY.

A judgment entered of record after articles of agreement to sell the real estate are executed, but before the deed is signed and delivered, is a lien upon the vendor's legal estate; and if after the execution and delivery of the deed the property is sold upon such judgment, the defendant can not be allowed his exemption out of the proceeds of sale.

CASE stated.

G. R. Fox & Son, Esqs., for plaintiff.

Jacob V. Gotwalts, Esq., for defendant.

The facts are set forth in the opinion of the court delivered December 3, 1888, by SWARTZ, P. J.

Jacob H. Bailey, the defendant, was the owner of the undivided one-eighth interest in certain real estate. He joined with the other owners in an agreement to sell the premises to the Pennsylvania Schuylkill Valley Railroad Company. After the execution of this agreement with the railroad company, the plaintiff, Milton M. Godshalk, entered of record in the Prothonotary's office a judgment against said Bailey. Afterwards a deed was executed to the railroad company for the said premises. On the 16th day of December, 1887, more than seven months after the execution and delivery of the deed, the plaintiff caused an alias fi. fa. to be issued on his execution, by virtue of which writ the Sheriff levied upon the defendant's interest in said real estate. The defendant claimed the benefit of the exemption against this writ.

The judgment having been entered after the execution of the articles of agreement to sell, but before the execution of the deed, was a lien upon the legal estate of the vendor, and the Sheriff's vendee would be entitled to the unpaid purchase money: Rudy vs. Wanner, 16 S. & R., 18.

The ownership having passed out of the defendant before he made his claim for exemption, the Sheriff should have disregarded the claim: Huey's Appeal, 29 Penna. St. R., 220.

But it is claimed that the exemption should prevail because at the time the purchase money was paid by the railroad company one hundred dollars were retained by counsel for the defendant "to abide the decision of the court." How can any arrangement made by the ven-

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dee to protect itself against this judgment affect the holder of the judgment? The plaintiff in the judgment did not agree to look for payment to this money so retained, for he proceeded with his execution against the land. So far as the plaintiff is concerned payment of the purchase money to defendant's counsel was payment to the defendant. We must meet the claim of exemption as we find it. The plaintiff levied upon the land, and the defendant claims his exemption out of the land or its proceeds, not out of the money in his counsel's hands. We are of opinion that the defendant is not entitled to his claim of exemption.

That the plaintiff has a lien upon said real estate as against the balance of the purchase money unpaid at the time of the entry of the judgment, and this balance of purchase money having been paid by the vendee to the defendant or his counsel before the execution was issued, the defendant's claim of exemption can not prevail against the execution or its proceeds.

And now, December 3, 1888, judgment is entered in favor of the plaintiff for the sum of eighty-five and sixteen-hundredths dollars with costs of suit, upon the case stated.

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WILLIAM N. NUTZ, PLAINTIFF IN ERROR, VS. UNION NATIONAL BANK OF SOUDERTON, DEFENDANT IN ERROR.

A summons issued by a justice of the peace which does not inform the defendant *where* he shall appear, is fatally defective.

A justice of the peace is a judicial officer; he holds a court, and to that place the defendant should be summoned to appear.

A writ of *certiorari* may issue after twenty days trom the rendition of judgment, where the justice has no jurisdiction, and the defendant avails himself of the writ within twenty days of notice of the proceedings.

CERTIORARI to Justice E. C. Beans.

Childs & Evans, Esqs., for plaintiff in error.

Charles Hunsicker, Esq., for defendant in error.

The facts sufficiently appear in the opinion of the court, delivered December 20, 1888, by YERKES, President Judge of the Seventh District, sitting at a special court.

The justice's writ in this case summoned the defendant to appear on a day certain, between the hours of one and two o'clock p. m., before the subscriber, one of the justices of the peace, in and for said county, to answer, etc. The summons is attested in Montgomery county, but is utterly silent as to where the defendant shall appear before the said justice. It does not state in what district he resides, nor where his office is located.

The Supreme Court in Murdy vs. McCutchen, 14 Norris, 435, say: "A justice of the peace is a judicial officer; he holds a court —that is, a place where justice is judicially administered. To that place defendant should have been summoned to appear. Notice to appear without stating where was practically no notice. He was not required to search in every nook of the county to find the justice." These words are equally applicable to this case. It is plain that the justice was misled as to his duty by the defective character of the printed form of summons. But his mistake must not be allowed to work injury to the defendant in a case where the mistake has resulted in depriving him of a clear legal right.

The certiorari was sued out nearly a month after the twenty days limitation had expired. This limitation does not apply where

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it is apparent the justice had no jurisdiction. Graver vs. Fehr, 7 W. N. C., 429.

In Laycock vs. White, 7 Harris, 498, it is said that "where judgment is given against a party without service of a summons, the proper remedy is to reverse on certiorari, and that the twenty days limitation does not apply to cases in which the justice has no jurisdiction, either of the parties or the subject matter; and he has no jurisdiction of the former where they are not legally summoned."

The party must act within a reasonable time after he has been served with notice of the judgment against him. By analogy it has usually been considered that twenty days after such notice is in time. The fact that notice was not given may be proved by parole. Laycock vs. White, *supra*.

The plaintiff in error has testified that he did not know where the justice lived; that after the service of the summons he went to the bank, the plaintiff in the suit, and explained that his signature to the note, upon which the action was founded, was a forgery, and was induced to believe that the matter would be dropped; that he had not notice of the judgment until he came to Norristown to consult his attorney, Judge Swartz, about other notes, and was then informed that this judgment had been entered against him. He then sued out this certiorari.

We are of opinion that he was in time and did all that was to be expected of him in the exercise of due diligence. A party is not to be misled, thrown off his guard, and then caught napping, without being allowed a legal remedy. The law will, under such circumstances, hold him liable for diligence only from the time when he is apprised of the proceedings against him.

The first exception is sustained. It is unnecessary to discuss or consider those remaining.

And now, to wit, December 20, 1888, the judgment is reversed.

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BENJAMIN B. HUGHES VS. CHALKLEY JONES.

When a title is once acquired by twenty-one years adverse possession, the mere fact that the fences are removed will not of itself revest the title in the former owner, without something more to show that he has again resumed possession.

SUR motion for new trial.

Larzelere & Gibson, Esqs., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts fully appear in the opinion of the court, delivered December 3, 1888, by WEAND, J.

The reasons assigned for a new trial are, first, error in the charge relating to adverse possession by plaintiff; and second, after discovered testimony. The court charged the jury that if plaintiff had acquired title by twenty-one years adverse possession, the mere fact that he had moved his fences back of the trees would not of itself revest the title in the defendant, without anything more on his part to show that he had resumed possession. We think the ruling of the court is sustained by the case of Schall vs. Williams Valley R. R., 11 Casey, 191, and that the principles there laid down govern this case.

The defendant was bound to defend his conduct and title to the trees, and the plaintiff had the right to assert title, either by grant or occupation. The after discovered testimony is merely cumulative, and even if proved at the trial would not necessarily have produced a different result. The law governing cases of this kind is clearly stated in Com. vs. Flanagan, 7 W. & S., 415: "Cumulative evidence, by which is meant additional evidence to support the same point, or where it is of the same character as evidence already produced, is not sufficient to induce the court to grant a new trial: 10 Wend., 285. When the motion for a new trial is considered, the court must judge not only of the competency but of the effect of the evidence. If, with the newly discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the application. And in Lewellen vs. Parker (4 Har. O. R., 5) it is ruled that in considering the motion the court will not inquire whether, taking the newly discovered testimony in connection with that exhibited on

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the trial, a jury *might* be induced to give a different verdict; but whether the legitimate effect of such evidence would *require* a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury) not whether they might but whether they ought to give a different verdict."

Even had this testimony, therefore, been produced on the trial with the same result, there would have been no reason for disturbing the verdict, particularly as the court can not judge whether the jury based their finding upon the title by deed and survey or that of adverse possession.

The instruction with reference to the interest was wrong according to the since reported case of Dunbar Furnace Co. vs. Fairchild, Leg. Int., Vol. 45, No. 44, page 404; but fortunately the jury in their written verdict separated the items of damage, from which the error can now be corrected. The damages were assessed at $70; interest, $18.74; total, $88.74; trebled, $266.22. By deducting two-thirds of the interest allowed we find the true amount to be $228.74, and unless plaintiff agrees to suffer this reduction a new trial will be ordered.

And now, December 3, 1888, the motion for a new trial is overruled on condition that plaintiff will within ten days from this date file a paper in the cause agreeing that the verdict shall be reduced to $228.74, and upon filing such paper within said period a new trial is refused and judgment directed to be entered for the reduced amount ($228.74) on payment of the verdict fee; otherwise a new trial will be granted.

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